Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

LARRY BECKER, ET AL.,
Petitioners,

v.

MACK TRUCKS, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED FOR REVIEW

A. WHETHER MACK TRUCKS VIOLATED §510 OF ERISA BY NOT RE-EMPLOYING VESTED FORMER EMPLOYEES WHEN ITS CONDUCT IS PROHIBITED SINCE IT DISCRIMINATES AGAINST THOSE FORMER EMPLOYEES FOR THE PURPOSE OF INTERFERING WITH THEIR ATTAINMENT OF A RIGHT UNDER THE PENSION PLAN?

B. WHETHER THE NON-VESTED FORMER EMPLOYEES HAVE STANDING UNDER § 510 OF ERISA WHEN THEY HAVE (1) A COLORABLE CLAIM FOR BENEFITS SINCE THEIR CREDITED SERVICE IS NON-FORFEITABLE UNDER THE TERMS OF THE PENSION PLAN OR (2) A REASONABLE EXPECTATION OF RETURNING TO COVERED EMPLOYMENT BUT FOR THE EMPLOYER'S CONDUCT?

II. LIST OF PARTIES

The named Plaintiffs not set forth in the caption are as follows:

STEPHEN CAPKOVIC, III; LEE R. CHRIST; JAMES DAQUISTO; MICHAEL DREHER; RANDY FREY; ROBERT GASTON; CHARLES GROHOTOLSKI; BARRY JONES; JOHN JUDD; DENNIS KNOPF; WAYNE LABATY; WILLIAM LEHMAN; THOMAS LITCHAUER; BRUCE McFARLAND; MICHAEL MEYERS; SAMUEL OLIVERIA; ROBERT PETERS; SHERWOOD PETERS; THOMAS ROBERTS; KATHERINE TAKACS; SCOTT TAKACS; ANTHONY TRATNYEK; CLAIRE WILLIAMS; DENNIS C. ACKER, RICHARD BALLIET; ALEXANDER BANDI, JR.; STEPHEN R. BECKER; TIMOTHY S. BELLER; ANITA L. BELLES; THOMAS F. BENNER, JR.; JUDITH A. BINDER; DAVID J. BOBO; JAMES P. BURGER, JR.; RALPH A. CHRISTMAN; LAVERN R. CLATER; ALFRED W. DILABIO; MICHAEL A. DILCHER; WAYNE R. ERNST; DANIEL H. FREED; EDWARD A. FREED; JOHN L. GOLDEN; MANUEL I. GUEDES; DENNIS P. HAFER; SHEILA K. HANSLER; CLAYTOR HOWARD; JEFFREY HUSACK; JAMES P. KALAVODA; JOZEF KAZIMIR; JOHN S. KERBACHER; ANTHONY A. KISS; JOSEPH J. KISS; STEPHEN J. KISS; MICHAEL KLUCAR; DENNIS G. KOEHLER; ANDREW J. KORUTZ; RICHARD D. KRATZER; THOMAS A. MARSHMAN; RONALD P. MARCKS; JAN A. MERKEL; JANE L. MICHAEL; CHESTER C. MILLER; PAUL J. MISHKO, JR.; DENNIS R. PASCOE; THOMAS E. PRUZINSKY; JOSEPH M. RICE; BRUCE L. ROTHROCK, JR.; EDWARD R. SAJT; GERALD ROBERT SCHUECK; PETER M. SINCLAIR; DAVID W. SMITH; DALE R. SNYDER; MARYANN J. SOSNOWSKI; DARREL C.

STOFFLET; GEORGE M. SZEP; JOHN J. SZILAGYI; BRUCE TORRENCE; and CHERYL A. YANDRASITS

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IV. CITATIONS OF THE OFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED

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V. STATEMENT OF JURISDICTION

A. DATE THE JUDGMENT OR ORDER SOUGHT TO BE REVIEWED WAS ENTERED.

The Court of Appeals of the Third Circuit entered judgment against the Petitioner on February 21, 2002.

B. STATUTORY PROVISION CONFERRING JURISDICTION

29 U.S.C. § 1132.

28 U.S.C. § 1254

VI. STATUTES INVOLVED

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this sub-chapter, § 1201 of this Title, or the Welfare and Pension Plans Disclosure Act (29 U.S.C. § 301, *et seq.*, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan

this sub-chapter, or other Welfare and Pension Plans Disclosure Act. 29 U.S.C. § 1140, ERISA § 510.

VII. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

On March 13, 2000 Williams (Petitioner) and twenty-three (23) other former employees of Mack Trucks, Inc. (Respondent) filed this civil action alleging that Mack Trucks had violated § 510 of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1140. On June 2, 2000 Plaintiffs amended their Complaint to add fifty-four (54) Plaintiffs. The Plaintiffs alleged Mack had violated § 510 by its refusal to rehire them because Mack had learned that returning former Mack employees to work would result in additional costs to Mack pursuant to the Mack-UAW Pension Plan (the Plan). Defendant filed a timely answer admitting the essential facts of the Complaint, i.e., its refusal to reemploy former employees because of the pension liability which would occur if they returned to employment.

Without the need for discovery, the parties entered into a Stipulation of Facts. Mack filed a Motion for Summary Judgment in support of its position that the allegations of the Plaintiffs Complaint, together with the Defendant's Answer and the Stipulation of Facts, fails as a matter of law, to state a cause of action under ERISA § 510. Plaintiffs filed a cross-Motion for Summary Judgment alleging as a matter of law that the Defendant had violated § 510 of ERISA by refusing to rehire them because of the increased pension consequence.

By order dated November 30, 2000 the District Court entered judgment in favor of the Defendant Mack Trucks, Inc. against the Plaintiffs on all claims. In its supporting

Memorandum and Order, the District Court concluded that the Defendant was entitled to judgment as a matter of law on two (2) bases. First, as to the Plaintiffs who were not vested, the lower court concluded that the Plaintiffs did not have standing under ERISA §§ 3(7)&(502(a)(1)(B) (29 U.S.C. §§1002(7) & 1132 (a)(1)(B)). The Court also found Mack Trucks, Inc. was excluded from liability under § 510 of ERISA, 29 U.S.C. § 1140 for refusing to rehire any of the seventy-eight (78) Plaintiffs listed in the Amended Complaint in order to eliminate Mack Trucks potential liability under the Mack-UAW Pension Plan.

Plaintiffs filed a timely appeal to the Third Circuit Court of Appeals. On February 21, 2002 that Court entered an Order affirming the District Court. The Court concluded that the non-vested Plaintiffs did not have standing since they had neither a colorable claim to vested benefits nor a reasonable expectation of returning to covered employment. As to the vested Plaintiffs, the Court concluded that the language of § 510 does not prohibit Mack's conduct since it did not include the word "hire". It also concluded that the purpose of § 510 envisions an employment relationship and that since these Plaintiffs did not have such a relationship with Mack Trucks, Mack's conduct was not prohibited.

B. STATEMENT OF THE FACTS

Mack's headquarters is located in Allentown, Lehigh County, Pennsylvania and it manufactures and distributes heavy-duty trucks. Since 1975 it has maintained an assembly plant in Macungie, Pennsylvania which employs approximately eight hundred (800) production and maintenance workers represented by United Automobile-Aerospace and Agricultural Implement Workers Local 677 (UAW/Union). From 1930 to 1987, it had extensive assembly

plants in Allentown, Pennsylvania. It shut down those facilities in 1987. Both the employees at Allentown and Macungie were represented by the UAW. Under the terms of the Collective Bargaining Agreement (CBA) between Mack Trucks, Inc. and the UAW, the parties negotiated the Plan. The Plan is a defined benefit plan which provides pension benefits for UAW bargaining unit employees who are employed at its facilities in Allentown, Macungie, and other sites.

When Mack shut down its facilities in Allentown in 1987, a significant number of employees lost their jobs. Some of the employees transferred to other Mack facilities in Winsboro, South Carolina, or Macungie, Pennsylvania. Still others accepted a "dislocation benefit", a sum of money to relinquish their seniority and recall rights under the CBA. Still others were laid off and exhausted their recall rights as defined under the CBA. The Plaintiffs in this case consist of employees who either accepted the dislocation benefit or were laid off and are now without recall rights.

In 1997, a combination of rising production needs and workforce attrition made it necessary for Mack to hire new employees at its Macungie facility. Mack entered into an agreement with the Lehigh Valley Private Industrial Council (PIC) to assist in pre-screening and testing applicants. Beginning in April 1997 Mack hired former employees but none of the Plaintiffs. However, a few months later in July 1997, Mack realized that hiring such former employees created future pension liability greater than the liability incurred hiring an individual who had no past Mack pension credit.

There were three (3) factors that caused this. First, prior to 1989, the Plan had a ten (10) year vesting

requirement. Employees working on or after January 1, 1989 are subject to a five (5) year vesting requirement. Therefore, some of the Plaintiffs who had been laid off before 1989 were not vested. However, the Plan provided that any employee who returned to work would be entitled to a credit for past service under the Plan.

The second factor which caused Mack to refuse to return former employees to work was that such employees would be more likely to be eligible for early retirement before age sixty-two (62) than non-former employees. Any employee who was vested before 1989 (had ten years of service) would be eligible for early retirement upon reaching age sixty (60). Any of those eligible employees would then be entitled to supplemental payments under the Plan and post-retirement health and life insurance benefits at the point of early retirement. On the whole, employees who had past service credit would, by reaching the early retirement age faster because of their prior years of service, increase the cost of the Plan to Mack.

Third, the Plan's basic (accrued) retirement benefits are subject to possible increase whenever Mack and UAW negotiate the CBA. Deferred vested benefit rates (the benefit for which a former employee would be eligible upon reaching normal retirement age - sixty-five (65)) are generally fixed at the benefit rate applicable when the employee terminates his employment, not when he retires. Negotiations after the Plaintiffs were laid off has resulted in increased benefit rates. Therefore if a former employee returns to work and then retires, he would be entitled to the higher benefit rate based upon his date of retirement as opposed to the lower rate he would receive based upon the date when he was laid off.

In July 1997, Mack adopted an unwritten policy by which it refused to consider former employees who had prior credited service in the Plan for re-entry into any bargaining unit position at the Mack Trucks facility in Macungie for the cost reasons outlined above. Mack refused to consider the Plaintiffs for employment as a result of this policy. Mack adopted this policy on a blanket basis, i.e., it applied to former employees who were vested and those who were not vested.

C. BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE.

28 U.S.C. § 1331

29 U.S.C. § 1132

VIII. ARGUMENT

A. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE A SPLIT IN THE CIRCUITS AS TO WHETHER AN EMPLOYMENT RELATIONSHIP IS A REQUIREMENT TO SUPPORT A CAUSE OF ACTION UNDER § 510.

A basis for the Court of Appeals decision dismissing the vested Plaintiffs' claim is that the purpose of § 510 does not protect job applicants because Congress intended to provide a broad array of safeguards for existing employment relationships but not to persons such as the Plaintiffs who are seeking to be re-employed. *Becker, et al. vs. Mack Trucks, Inc.*, 281 F.3d 372, 382 (2002).

The Third Circuit's requirement of an employment relationship for § 510 protection is consistent with the Seventh and Tenth Circuits which came to the same conclusion. *Lindemann vs. Mobil Oil Corp.*, 141 F.3d 290, 295 (7th Cir. 1998); *Anderson vs. Chrysler Corp.*, 99 F.3d 846, 856 (7th Cir. 1996); *Teumer vs. General Motors Corp.*, 34 F.3d 542, 544 (7th Cir. 1994); *Deeming vs. American Standard, Inc.*, 905 F.2d 1124, 1127 (7th Cir. 1990); *Woolsey vs. Marion Labs, Inc.*, 934 F.2d 1452, 1461, (10th Cir. 1991). The Fifth and Sixth Circuits, on the other hand, have come to the opposite conclusion specifically rejecting the requirement that an employment relationship must exist. *Mattei vs. Mattei*, 126 F.3d 794, 804 (6th Cir. 1997); *Heimann vs. National Elevator Industry Pension Fund*, 187 F.3d 493, 507 (5th Cir. 1999).[1] Noting that the Supreme Court has not interpreted the term "discriminate against" in the context of § 510 of ERISA, the *Heimann* court adopted a definition of discriminate against to mean "to retaliate economically against." *Id.* at 505. The Court reviewed numerous Supreme Court decisions wherein this Court has construed the same words in other anti-retaliation provisions of federal statutes. *Robinson vs. Shell Oil Co.*, 519 U.S. 337, 342, 345, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997) (§ 704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-(a); *NLRB vs. Scrivener*, 405

[1] The lower court's attempt to distinguish *Mattei and Heimann* is unconvincing. *Becker vs. Mack Trucks, Inc.*, 281 F.3d 372, 383 (2002). The Court argued that those cases were distinguishable because "they address rights stemming from a pre-existing employment relationship, rather than rights arising from a prospective employment relationship." *Id. at 383 n.10.* The entire bases of these Plaintiffs' claim that Mack's conduct is prohibited when it refused to rehire them is based upon the rights which arose from the fact that they had a pre-existing employment relationship. Without that pre-existing employment relationship, this claim does not exist.

U.S. 117, 121-22, 92 S.Ct. 798, 31 L.Ed. 79 (1972) (§ 8(a)(4) of the National Labor Relations Act), 29 U.S.C. § 158(a)(4); *Mitchell vs. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292-93, 80 S.Ct. 332, 4 L.Ed. 2.d 323 (1960) (§ 15(a)(3) of the Fair Labor Standards Act of 1938, 29 U.S.C. § 215(a)(3)); *Cf. Mertens vs. Hewitt Associates*, 508 U.S. 248, 259, 113 S.Ct. 2063, 124 L.Ed. 2.d 161 (1993).

The Fifth and Sixth Circuits have correctly interpreted § 510 consistent with prior Supreme Court decisions construing similar statutes and consequently, the Third, Seventh, and Tenth Circuits have incorrectly interpreted § 510.

1. "Discriminate against" as used in the context of § 510 of ERISA means to retaliate economically against and does not require a specific employment relationship when considering § 510's purpose.

The Court of Appeals decided the "merits" of the case on two bases: (1) the "purpose" and the intent of § 510 and (2) the "text" of the statutory language. The purpose of § 510 demands a different conclusion.

In order to establish a *prima facie* case under § 510, an employee must show: (1) prohibited employer conduct; (2) taken for the purposes of interfering; (3) with the attainment of any right to which the employee may become entitled. *Gavalik vs. Continental Can Co.*, 812 F.2d 834, 852, (3d Cir. 1987), *cert. denied*, 484 U.S. 979, 108 S.Ct. 494, 98 L.Ed. 492 quoted by *Berger vs. Edgewater Steel Co.*, 911 F.2d 911 (3rd Cir. 1990). See also *Hendricks vs. Edgewater Steel Co.*, 898 F.2d 385, 389, (3d Cir. 1990) (relying upon *Gavalik*). In this case the parties have stipulated that Mack Trucks has engaged in conduct taken for

the purpose of interfering with the Plaintiffs' attainment of a right to which they may be entitled under ERISA, i.e., pension benefits under the Plan. The only question is whether that is "prohibited employer conduct". The Court of Appeals found that "suits for discrimination under § 510 are 'limited to actions affecting the employer-employee relationship,'" when it concluded that only that category is entitled to § 510 protection. *Becker*, 281 F.3d 372, 382 (2002) quoting *Haberern vs. Kaupp Vascular Surgeons Ltd. Defined Benefit Pension Plan*, 24 F.3d 1491, 1503 (3d Cir. 1994).

In *Haberern*, an employer adopted an amendment to a welfare plan which effectively eliminated life insurance provisions for an employee. The plaintiff alleged that this action was discriminatory conduct and a violation of § 510 because it discriminated among participants in the plan by curtailing her right to life insurance as compared to other employees. The issue was whether an employee can violate § 510 by unequal apportionment of benefits. Reversing the District Court, the Court of Appeals answered that question in the negative by finding that unequal apportionment of benefits under a ERISA plan is not a § 510 violation although it may be a violation of § 240(g) of ERISA, 29 U.S.C. § 1054(g). Thus, the issue the Court addressed in *Haberern* is not remotely related to the issue in this case.

The Court of Appeals ignored the statutory language. Section 510 makes it unlawful for any person to "...discriminate against a participant... for the purpose of interfering with the attainment of any right which such participant may be entitled under the plan..." ERISA § 510, 29 U.S.C. § 1140. Section 3(7) of ERISA defines participants not only as employees but also as former employees. Obviously, a former employee does not have an

employer-employee relationship. Nonetheless, such a former employee participant remains protected against discrimination by § 510. To argue that suits for discrimination under § 510 are 'limited to actions affecting the employer-employee relationship...' (*Id.* at 1503) ignores the unlawful nature of discrimination against participants who are former employees. *Heimann* is directly on point. In *Heimann*, a former employee was receiving pension benefits and his wife was receiving health insurance benefits. Thus, both were participants in the plan as that term is used in ERISA. The plaintiff engaged in employment after his retirement with another employer. The business agent for the union misrepresented to the pension fund that the plaintiff had engaged in what was known as "disqualifying employment" thereby resulting in a suspension of pension benefits to him and a suspension of health insurance benefits for he and his wife. Plaintiff then filed suit against the pension fund, among others, alleging a violation of § 510.

In that context, the 5th Circuit Court of Appeals had the specific opportunity to define the word discriminate as it is used in § 510. In noting that the Supreme Court has not interpreted the term in the context of § 510, it found that the Supreme Court had construed the same words in the anti-retaliation provisions of other federal statutes and therefore adopted the definition to mean "to retaliate economically against". *Id.* at 505, citing *Robinson vs. Shell Oil Company*, 519 U.S. 337, 117 S.Ct. 843, 136 L.Ed.2.d 808 (1997) (Section 704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-(a); *NLRB v. Scrivener*, 405 U.S. 117, 121-122, 92 S.Ct. 708, 31 L.Ed.2d 79 (1972) (Section 8(a)(4) of the National Labor Relations Act, 29 U.S.C. § 158(a)(4)); *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292-293, 80 S.Ct. 332, 4 L.Ed.2d 323 (1960) (Section

15(a)(3) of the Fair Labor Standards Act of 1938, 29 U.S.C. § 215(a)(3)).

The *Heimann* court then, citing *Haberern* and other cases noted the following:

> Accordingly, we do not find determinative or helpful the flawed but frequently quoted *dicta* of *West v. Butler*, 621 F.2d 240 (6th Cir. 1980), that ERISA's legislative history indicates that the [§ 510] prohibitions were aimed primarily at preventing unscrupulous employers from discharging or harassing their employees in order to keep them from obtaining vested pension rights[,]' *id.* at 245, and 'that discrimination to violate § 510, must affect the individual's employment relationship in some substantial way.' *Id.* at 245-246.

Heimann, 187 F.3d 493, 507.

The court then discussed the 6th Circuit's decision in *Mattei* which held that the anti-retaliatory protection of § 510 is not limited to shielding only active employees from economic sanctions but that Congress's desire when it enacted § 510 was " . . . to protect pension rights and expectations from 'economic sanctions' – a broad discrimination not limited to the sphere of employment." *Id.* at 800; quoted by *Heimann*, 187 F.3d at 507. The *Heimann* court agreed with the *Mattei* court. Concerning the off-quoted phrase "that the (§ 510) prohibitions were aimed primarily at preventing unscrupulous employers from discharging or harassing their employees in order to keep them from obtaining vested pension rights" (*West vs. Butler*, 621 F.2d 240 (6th Cir.

1980)) and therefore, the individuals' employment relationship must be affected in some substantial way, the *Mattei* and *Heimann* courts held that while it was § 510's primary purpose it was not its only purpose, and that it was inappropriate for § 510 to be so narrowly construed.

Finally, when discussing the *Haberern* "employment relationship" argument, the *Heimann* court made short work of the proposition that the employment relationship requirement prohibits actions under § 510 by former employees. It noted that that when a court limits ERISA in accordance with that argument, it leaps to a conclusion that has no support in the text or legislative history of ERISA. It requires a reading of § 510 which would give the word "participant" a different meaning in § 510 than in § 1002(7) and elsewhere in ERISA. "...or that we judicially exclude retirees, i.e., former employees, from all rights, information, remedies and access to court afforded other participants by ERISA." *Id.* at 508. The court refused to do so and held that an employment relationship is not required to establish a cause of action of § 510.

2. The text of § 510 prohibits Mack's conduct by its plain language and its legislative history and therefore the lower court has interpreted § 510's prohibitions too narrowly.

The Court of Appeals concluded that not only does the purpose of § 510 not prohibit Mack's conduct, but also that the text of § 510 does not proscribe such conduct. The Court reviewed the plain language of the statute, legislative history, and other anti-retaliatory statutes to support its position. Those arguments are unpersuasive.

Section 510 provides that "it shall be unlawful for any person to... discriminate against a participant... for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan..." *Webster's* defines discriminate as "to make a difference in treatment or favor on a basis other than individual merit". *Webster's New Collegiate Dictionary* (1976). The vested Plaintiffs are "participants". They have received "a difference in treatment" on a basis other than their individual merit, i.e., "for the purpose of interfering with the attainment of a right" under the Plan. That is the avowed and intentional purpose of Mack's policy, i.e., not to re-employ former Mack employees because they will attain pension rights which may increase Mack Trucks costs. This is expressly prohibited by ERISA.

The Court of Appeals also reviewed other employment related remedial legislation by Congress which includes the word "hire" and held that since ERISA does not, that is evidence of Congress's intent not to prohibit the conduct of Mack. See, e.g., Title VII, 42 U.S.C. § 2000(e-2)(a), the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623(a)(1), the National Labor Relations Act, 29 U.S.C. § 158(a)(3), and the Americans with Disabilities Act (ADA), 42 U.S.C. § 12112(a) as examples. (*Id.* at 1203.) There are two (2) answers to this argument. First, that argument taken to its logical end causes an absurd result. Second, the argument that the inclusion of the words "discharge, fine, suspend, expel, or discipline" is exhaustive is contrary to the general

rules of statutory construction, other judicial interpretations[2], and legislative history.

As the Supreme Court noted in *Circuit City Stores, Inc. vs. Adams*, 532 U.S. 105, 121 S.Ct. 1302, 149 L.Ed.2d 234 (2001) "Canons of construction need not be conclusive and are often countered, of course, by some maximum pointing in a different direction." 532 U.S. at 114. The Defendant's argument, taken to its logical extreme, means that if on April 1, 1997 it rehired a former Mack employee, it could not terminate that employee on April 2, 1997, but if a similarly situated former employee requested rehire on April 2, 1997, it could refuse to hire that employee because that refusal is not the type of conduct Congress intended to prohibit when enacting § 510. That is, however, exactly the type of conduct § 510 was enacted to prohibit - discrimination. There is no dispute that the April 1997 former employees and the July 1997 former employees are both participants under the Act and therefore are entitled to § 510's protection (ERISA defines "participant" as both employees and former employees. (29 U.S.C. § 1002(7)).)[3] This Court should not treat them different because there is no difference in applying § 510 protections.

The legislative history of ERISA supports the conclusion that § 510 applies in this circumstance. The focus should be on the remedial purpose of ERISA and § 510 in particular and not on strained statutory construction designed

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[2] See *Gavalik vs. Continental Can Co.*, 812 F.2d 834 (3d Cir. 1987) *cert denied*, 484 U.S. 979, 108 S.Ct. 494, 98 L.Ed. 492, *Pickering vs. USX Corp.*, 809 F.Supp. 1501 (D.C. Utah 1992), and *Conkwright vs. Western Electric Corp.*, 933 F.2d 231 (4th Cir. 1991).

[3] § 510 protects participants. Section 3(7) defines participants as employee and former employee.

to eliminate a cause of action. The legislative history of ERISA supports the opposite result. The Court in *Conkwright vs. Western Electric Corp.*, 933 F.2d 231 (4th Cir. 1991), when deciding that vested employees had the right to challenge a layoff because it interfered with their rights to attain additional benefits under the plan, found the plaintiff to have a cause of action under § 510 even though nowhere in § 510 does the word layoff appear as prohibited conduct after reviewing the legislative history. *Id.* at 237. Thus, the legislative purpose of ERISA and § 510 in particular urges an expansive, not limiting reading of the word discriminate.

B. THE COURT OF APPEALS CONCLUSION THAT NON-VESTED PLAINTIFFS DID NOT HAVE STANDING IS IN CONFLICT WITH A PREVIOUS DECISION OF THIS COURT.

The Court of Appeals' decision that the non-vested plaintiffs have no standing conflicts with this Court's decision in *Inter-Modal Rail Employees Assn. vs. Atchinson, Topeka and Santa Fe Ry. Co.*, 520 U.S. 510, 117 S.Ct. 1513, 137 L.Ed.2d 763 (1997).

The 9th Circuit in *Inter-Modal* had held that employees who allege they were terminated because they were not provided welfare benefits have no standing under § 510 because § 510 is designed to protect only those employees who have or may be entitled to vested benefits. Since welfare benefits by definition under ERISA cannot be vested, the 9th Circuit found that there was no standing. This Court rejected the argument that vesting or potential vesting is a prerequisite of standing. When discussing the definition of "participant" as it relates to standing, the court refused to deny the plaintiffs claim on the basis that since they were not vested

and had no potential for every being vested, they were not participants as that term is used in § 510. If the plaintiffs in a welfare fund have standing despite the lack of vesting, then it follows that lack of vesting in a pension fund should not act to defeat standing since § 510 protections apply to participants of both pension and welfare funds without statutory distinction.

The non-vested plaintiffs have standing to bring this action because they are participants as that term is defined under ERISA. In order to state a claim under ERISA, the Plaintiffs must be "participants" in the Plan, 29 U.S.C. § 1132(a)(2). ERISA defines a participant as:

> Any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

29 U.S.C. § 1002(7).

There is no dispute that the Plaintiffs are not employees but are former employees as that term is used in § 3(7) of ERISA. The inquiry therefore is whether or not the non-vested Plaintiffs are "former employee(s)... who ... may become eligible to receive a benefit..." under the Plan.

This Court, in *Firestone Tire & Rubber Co. vs. Bruch*, 489 U.S. 101, 109 S.Ct. 948, 103 L.Ed.2d. 80 (1989), held to have standing to bring an ERISA action, Plaintiffs as

former employees are "participants" if they have a reasonable expectation of returning to covered employment or a colorable claim to vested benefits.

However, "The requirement of a colorable claim is not a stringent one... [O]nly if 'any claim... must be frivolous is jurisdiction lacking.' " *Panaras vs. Liquid Carbonic Indus. Corp.*, 74 F.3d 786, 790 (7th Cir. 1996) (quoting *Kennedy vs. Connecticut General Life Ins. Co.*, 924 F.2d 698, 700 (7th Cir. 1991)); see *Abraham vs. Exxon Corp.*, 85 F.3d 1126, 1129 (5th Cir. 1996) (the test is not actual entitlement to benefits, it is whether plaintiff has a colorable claim that he will prevail). *Firestone* did not make the standing question a straightforward formula which can be applicable to all cases. *Shawley vs. Bethlehem Steel Corporation*, 989 F.2d 652, 658 (3d Cir. 1993). Rather, the definition of a "participant"

> must be read in the context of traditional concepts of standing, not in the context of adjudicating the ultimate issue of the merits of plaintiff's claim that they are not receiving the full extent of the benefits to which they are entitled... standing focuses on a person's efforts to get his complaint before a court and not on the issue he wishes to have adjudicated.

Aster vs. Int'l Business Machines Corp., 7 F.3d 533, 538 (6th Cir. 1993) (quoting *Hughes vs. General Motors Corp.*, 852 F.2d 568 (6th Cir. 1988), *cert. denied*, 489 U.S. 1081, 109 S.Ct. 1535, 103 L.Ed 2d 839 (1989).

Any re-hired employee, no matter what the length of his separation, is entitled under Article III, Section 3(d) of the 1992 Plan to credit for past service under the Plan. In fact,

this entitlement to past service credit is one of the reasons Mack refused to return them to employment. In essence, the Plan, which is absent the Rule of Parity, provides these plaintiffs with a non-forfeitable benefit. Former employees must have a "colorable claim to vested benefits." *Raymond*, 983 F.2d at 1533. These Plaintiffs do have a colorable claim to these years of credited service because they are, by function of the Plan, vested.

The Third Circuit in *Shawley* approved the applicability of the "but for" test in deciding if a plaintiff has a reasonable expectation of returning to employment. The "but for" analysis should result in finding that the non-vested Plaintiffs have standing. The Court of Appeals focused on the reason for the employees' initial separation when deciding that the employees did not have a reasonable expectation of returning to covered employment. The focus, however, should not be upon the reasons for the Plaintiffs' layoff. The Plaintiffs have never argued that the layoff was somehow illegal under § 510 of ERISA. The Plaintiffs argument is that the employer's failure to rehire is the illegal conduct under ERISA and "but for" the employer's conduct alleged to be in violation of ERISA (the refusal to rehire), the Plaintiffs would be current employees with "a reasonable expectation of receiving benefits". Therefore, Mack Trucks should not be able to defeat the employees' standing through its own malfeasance of refusing to rehire. *Christopher vs. Mobil Oil Corp.*, 950 F.2d 1209 (5th Cir. 1992), *cert denied*, 506 U.S. 820, 113 S.Ct. 68, 121 L.Ed.2d 35 (1992).

IX. CONCLUSION

WHEREFORE, Petitioners pray that their Petition for Certiorari be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 00-4414

[Filed February 21, 2002]

LARRY BECKER; STEPHEN CAPKOVIC, III; LEE R. CHRIST; JAMES DAQUISTO; MICHAEL DREHER; RANDY FREY; ROBERT GASTON; CHARLES GROHOTOLSKI; BARRY JONES; JOHN JUDD; DENNIS KNOPF; WAYNE LABATY; WILLIAM LEHMAN; THOMAS LITCHAUER; BRUCE MCFARLAND; MICHAEL MEYERS; SAMUEL OLIVERIA; ROBERT PETERS; SHERWOOD PETERS; THOMAS ROBERTS; KATHERINE TAKACS; SCOTT TAKACS; ANTHONY TRATNYEK; CLAIRE WILLIAMS; DENNIS C. ACKER; RICHARD BALLIET; ALEXANDER BANDI, JR.; STEPHEN R. BECKER; TIMOTHY S. BELLER; ANITA L.)

BELLES; THOMAS F. BENNER,)
JR.; JUDITH A. BINDER; DAVID)
J. BOBO; JAMES P. BURGER,)
JR.; RALPH A. CHRISTMAN;)
LAVERN R. CLATER; ALFRED)
W. DILABIO; MICHAEL A.)
DILCHER; WAYNE R. ERNST;)
DANIEL H. FREED; EDWARD)
A. FREED; JOHN L. GOLDEN;)
MANUEL I. GUEDES; DENNIS)
P. HAFER; SHEILA K.)
HANSLER; CLAYTOR)
HOWARD; JEFFREY HUSACK;)
JAMES P. KALAVODA; JOZEF)
KAZIMIR; JOHN S.)
KERBACHER; ANTHONY A.)
KISS; JOSEPH J. KISS;)
STEPHEN J. KISS; MICHAEL)
KLUCAR; DENNIS G.)
KOEHLER; ANDREW J.)
KORUTZ; RICHARD D.)
DRATZER; THOMAS A.)
MARSHMAN; RONALD P.)
MARCKS; JAN A. MERKEL;)
JANE L. MICHAEL; CHESTER)
C. MILLER; PAUL J. MISHKO,)
JR.; DENNIS R. PASCOE;)
THOMAS E. PRUZINSKY;)
JOSEPH M. RICE; BRUCE L.)
ROTHROCK, JR.; EDWARD R.)
SAJT; GERALD ROBERT)
SCHUECK; PETER M.)
SINCLAIR; DAVID W. SMITH;)
DALE R. SNYDER; MARYANN)
J. SOSNOWSKI; DARREL C.)

STOFFLET; GEORGE M. SZEP;)
JOHN J. SZILAGYI; BRUCE)
TORRENCE; CHERYL A.)
YANDRASITS,)
)
Appellants)
)
v.)
)
MACK TRUCKS, INC.)
_____)

Appeal from the United States District
Court for the Eastern District
Of Pennsylvania
(D.C. Civil Action No. 00-cv-01338)
Honorable Franklin S. Van Antwerpen, District Judge.

JUDGES:
Before: ROTH, AMBRO and FUENTES, Circuit Judges.

OPINION

This case requires us to decide whether § 510 of the Employee Retirement and Income Security Act, 29 U.S.C. § 1140, applies to rehiring decisions. Plaintiffs are former employees of defendant Mack Trucks, Inc., who lost their jobs when Mack closed its Allentown plant in 1987. Some plaintiffs had vested pension rights at the time they were laid off. Others merely had credit for past service. In 1997, when the economy had improved, Mack needed to hire workers for its Macungie plant. By this time, all the plaintiffs had either exhausted or forfeited any recall rights with Mack. Mack declined to rehire plaintiffs because to do so would create a

future pension liability disproportionately greater than that incurred by hiring employees without past service or pension credit. Plaintiffs contend that Mack's decision amounts to unlawful "discrimination" under § 510 of ERISA.

The District Court rejected plaintiffs' claims in their entirety on a motion for summary judgment. We will affirm that decision. We agree, as an initial matter, that those plaintiffs without vested pension rights lack standing to pursue their § 510 claim. *See Shawley v. Bethlehem Steel Corp.*, 989 F.2d 652 (3d Cir. 1993). *Shawley* does not foreclose standing for those plaintiffs with vested rights, however; thus, we reach the merits of their claims and resolve the question left unanswered in *Shawley*: Whether an employer's refusal to rehire based on a desire to avoid increased pension liability is prohibited activity under § 510. *Id.* at 655 n.5. We conclude that § 510 does not proscribe Mack's refusal to rehire the vested plaintiffs.

I. FACTS

Defendant Mack Trucks manufactures and distributes heavy-duty trucks. It operates an assembly plant in Macungie, Lehigh County, Pennsylvania, and, until 1987, operated machining and fabrication plants in Allentown, Pennsylvania. Employees in both locations are and were represented by the United Automobile, Aerospace and Agricultural Implement Workers (UAW) and UAW Local 677. The plants in Allentown and Macungie were covered by the Mack-UAW Master Agreement as well as by local agreements.

The Master Agreement includes, as Appendix A, the Mack-UAW Pension Plan, which is subject to renegotiation

every time the Master Agreement itself is renegotiated. Prior to January 1, 1989, an employee covered by the Plan became vested under the Plan after ten years of service. On and after January 1, 1989, employees became vested after five years of service. The Plan also provided that any rehired former employee would be entitled to credit for past service no matter how long the break between employment periods.

When Mack closed its facilities in Allentown in 1987, a number of employees lost their jobs. Some transferred or were absorbed into other Mack plants. Others, like the plaintiffs, either accepted a cash "dislocation benefit" to relinquish their seniority rights or were laid off and eventually exhausted their recall rights. Some plaintiffs were laid off before meeting the ten year vesting requirement in place at the time; other plaintiffs were fully vested by the time they were laid off.

In 1997, a combination of rising production needs and workforce attrition made it necessary for Mack to hire new employees at the Macungie plant. Although Mack's former employees were initially the first to be offered new jobs, Mack soon realized that a rehired former employee with credited service under the Plan would receive a disproportionately larger pension than would a newly hired employee.

There are three reasons for this difference in pension benefits between former employees and new hires. First, former employees who had not vested under the Plan would receive credit for past service and would become vested in

less than the five years applicable to new hires.[1] Second, former employees were more likely to become eligible for early retirement before age 62. Third, former employees would be entitled to raise their pension rate on retirement above the lower benefit rate in place as of the day they had been laid off in 1987.

As a result, in July of 1997 Mack decided to stop hiring former employees with credited service under the plan. All 78 plaintiffs are former Mack employees who were not considered for re-employment due to Mack's pension liability avoidance policy.

The plaintiffs brought a complaint seeking injunctive and monetary relief based on allegations that Mack violated 29 U.S.C. § 1140 when it refused to rehire them. After Mack filed a timely answer admitting the essential facts of the complaint, the parties brought cross-motions for summary judgment and asked the District Court to rule on a core set of stipulated facts. On November 30, 2000, the District Court found that Mack's decision not to rehire plaintiffs was not unlawful and entered judgment in favor of Mack. Plaintiffs filed a timely appeal.

II. JURISDICTION AND STANDARD OF REVIEW

We have federal question jurisdiction over this case under 28 U.S.C. § 1331 because plaintiffs have alleged a

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[1] Because the Plan's vesting period of ten years employment had been reduced to five years in 1989, the unvested former employees with between five and ten years credited service would be credited on rehire with past service sufficient for vesting.

violation of § 510 of ERISA, 29 U.S.C. § 1140. We also have appellate jurisdiction to review the District Court's November 30, 2000, order granting summary judgment under 28 U.S.C. § 1291.

The cross-motions for summary judgment were submitted with no dispute as to a core set of stipulated facts, and the District Court resolved only issues of law in its ruling. As a result the standard of our review for the District Court's decision is plenary. *See West American Insurance Co. v. Park*, 933 F.2d 1236, 1238 (3d Cir. 1991).

III. DISCUSSION

A. STANDING

We first address whether the non-vested plaintiffs have standing to sue under § 510. A plaintiff may bring a civil action under § 510 of ERISA if he is a "participant or beneficiary" of a benefit plan. 29 U.S.C. § 1132(a)(1)(B). The statute defines a participant as "any employee or former employee of an employer . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan . . ." *Id.* at § 1002(7).

While there is no dispute that the non-vested plaintiffs are former employees, it is unclear whether they are "participants" under § 1002(7). To resolve this issue we must decide whether the non-vested plaintiffs, as former employees,[2] have (1) a "reasonable expectation of returning

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[2] A current employee who is constructively discharged in violation of ERISA need not show a reasonable expectation of

to covered employment" or (2) "'a colorable claim' to vested benefits." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 117, 103 L. Ed. 2d 80, 109 S. Ct. 948 (1989). While it is clear that the vested plaintiffs have standing under the second element, our opinion in *Shawley v. Bethlehem Steel Corp.*, 989 F.2d 652 (3d Cir. 1993), establishes that the non-vested plaintiffs fail both elements of Firestone.

i. Do non-vested plaintiffs have a reasonable expectation of returning to covered employment?

Like the plaintiffs in *Shawley v. Bethlehem Steel Corp.*, 989 F.2d 652 (3d Cir. 1993), the non-vested plaintiffs lack a reasonable expectation of returning to covered employment. The plaintiffs in *Shawley* were a group of former employees who had been laid off for several years. When their previous employer considered rehiring them but refused to do so, they sued under ERISA. The employees claimed that the employer violated the law by basing its hiring decision upon a desire to avoid increased pension liability. *Shawley*, 989 F.2d at 654-55. Under those facts, "where the collective bargaining agreement expressly covers recall rights, and former employees were not hired before the expiration of those rights--we believe plaintiffs had no reasonable expectation of reemployment." *Id.* 989 F.2d at 658.

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returning to covered employment to establish standing under ERISA. *Berger v. Edgewater Steel Co.*, 911 F.2d 911, 922 (3d Cir. 1990).

The non-vested plaintiffs here are indistinguishable. Their collective bargaining agreement also covers recall rights. By the time Mack considered rehiring them, all of their recall rights had either expired or been waived in lieu of dislocation benefits. Thus, under our holding in *Shawley*, non-vested plaintiffs lack a reasonable expectation of reemployment.

The non-vested plaintiffs contend nevertheless that their reasonable expectation of reemployment and the consequent vesting of their benefits would have been realized "but for" Mack's refusal to rehire them. In support of this proposition, they cite *Christopher v. Mobil Oil Corp.*, 950 F.2d 1209 (5th Cir. 1992). Their argument, however, ignores our earlier rejection of standing for similarly situated plaintiffs even under the Christopher "but for" analysis. *Shawley*, 989 F.2d at 658-59. As we explained there, the "but for" analysis grants standing only when the employer's action "in and of itself divests aggrieved parties of their status as covered employees." *Id.* (quoting Christopher at 1222).

The "but for" test does not establish standing for former employees who are not rehired after being laid off due to an economic downturn:

> Bethlehem Steel's refusal to rehire [plaintiffs] did not "in and of itself " strip [them] of their employee status. . . . Plaintiffs were not terminated, constructively discharged, or tricked into retiring from Bethlehem Steel--they were laid off because of an economic downturn in the steel industry.

Shawley, 989 F.2d 659. Thus, even if there were situations in which the "but for" test is applicable--a question we need not resolve today--it does not support standing for plaintiffs here. As in *Shawley*, Mack's refusal to rehire former employees did not "in and of itself " strip them of their employee status. The plaintiffs initially lost employee status when they were laid off many years earlier.

ii. Do non-vested plaintiffs have a colorable claim to vested benefits?

The non-vested plaintiffs also lack a colorable claim to vested benefits. To satisfy this element, a claimant "must have a colorable claim that (1) he or she will prevail in a suit for benefits or that (2) eligibility requirements will be fulfilled in the future." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 117-18, 103 L. Ed. 2d 80, 109 S. Ct. 948 (1989). We have held, under the Firestone standard, that non-vested, credited service "gave rise to only a forfeitable benefit," and that such a "contingent claim for future benefits does not satisfy the dictates of Firestone." *Shawley*, 989 F.2d at 657; *see also Agathos v. Starlite Motel*, 60 F.3d 143, n.10 (3d Cir. 1995) ("We have previously held that a claim for credited service does not give rise to a 'colorable claim' to vested benefits.").

Shawley involved the denial of ERISA standing to a group of non-vested former employees. They claimed that credited service, which counted as an accrued, forfeitable benefit under the rule of parity,[3] established standing because

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[3] 29 U.S.C. § 1053(b)(3)(D)(i)(II).

that benefit was not yet forfeited and would vest under the requirements of the Internal Revenue Code if the plan were to be terminated prior to the exhaustion of their credited service. *Shawley*, 989 F.2d at 656-57. We rejected this argument on the ground that such "contingent" benefits do not establish a colorable claim to vested benefits under the Firestone standard.

The non-vested plaintiffs attempt to distinguish *Shawley* by claiming that the rule of parity does not apply to their benefit agreement with Mack and that they cannot forfeit their past credited service because they have the right to retain it indefinitely after termination. This distinction is, however, without significance. Whether past credited service is forfeitable after a given period of time or never forfeitable does not change the outcome. "Credited service" is not the same thing as the "right to benefits." It is the nonforfeitable right to benefits, not the contingent, albeit nonforfeitable, right to credited service that is the relevant standard under Firestone. And, indeed, when the former employees in *Shawley* brought suit, they had not yet lost their right to credit for past service; it remained a contingent right until their re-employment within the period designated by the rule of parity. Thus, in *Shawley* we determined that a legally unenforceable claim to contingent benefits cannot establish a colorable claim to vested benefits under Firestone. The benefits here, arising from the non-vested plaintiffs' credited service, are materially indistinguishable from those in *Shawley*. They are contingent upon re-employment with Mack. For that reason, the non-vested former employees lack standing.

Nor will we deviate from our opinion in *Shawley*

based on the Supreme Court's intervening decision in *Inter-Modal Rail Employees Assoc. v. Atchison, Topeka, and Santa Fe*, 520 U.S. 510, 137 L. Ed. 2d 763, 117 S. Ct. 1513 (1997). Inter-Modal does not overrule or otherwise limit the efficacy of the Court's earlier opinion in Firestone or our standing analysis in *Shawley*. Inter-Modal is distinguishable because it does not deal with the threshold issue of standing and because it concerns not vested pension benefits, but health and welfare benefits, which do not vest, and whether health and welfare benefits are protected by § 510. *Id.* 520 U.S. at 513.

Thus we reject the non-vested plaintiffs' request for standing under the binding authority of Firestone and *Shawley*.[4]

Because the vested plaintiffs do have standing, however, we will now turn to the merits of their claims.

B. MERITS

The vested plaintiffs allege that Mack violated § 510 of ERISA, 29 U.S.C. § 1140, when it refused to rehire them

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[4] The plaintiffs here and in *Shawley* did not have any enforceable right to recall. We are not considering here what impact, if any, an enforceable right to recall might have on the standing issue.

in order to avoid increased pension liability. In order to demonstrate a prima facie case under § 510, a plaintiff must show "(1) prohibited employer conduct (2) taken for the purpose of interfering (3) with the attainment of any right to which the employee may become entitled." *Gavalik v. Continental Can Co.*, 812 F.2d 834, 852 (3d Cir. 1987). In this case, the parties do not dispute that Mack acted with the purpose of preventing pension benefit increases to previously terminated employees. The only remaining issue, then, is whether Mack engaged in prohibited conduct under § 510 in its refusal to rehire the vested plaintiffs.

To discern whether Congress intended in § 510 to regulate rehiring decisions, "we examine the explicit statutory language and the structure and purpose of the statute." *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138, 112 L. Ed. 2d 474, 111 S. Ct. 478 (1990). Based on that evidence, we decline to expand the reach of § 510 to cover the rehiring of former employees with no right or expectation of future employment. *See, e.g., West v. Greyhound Corp.*, 813 F.2d 951, 955 (9th Cir. 1987) ("we hold that no violation of section 510 of ERISA is shown where the seller of a business terminates employment under the provisions of a collective bargaining agreement and the purchaser refuses to hire any of the employees because they refuse to accept a reduction of unaccrued employee benefits"); *Shawley v. Bethlehem Steel Corp.*, 784 F. Supp. 1200, 1202-04 (W.D. Pa. 1992). Both the text and purpose of § 510 support the result we reach today.

i. The text of § 510

We begin, as we must, with the language of § 510:

> **Interference with protected rights.** It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan
>
> . . . .

29 U.S.C. § 1140.

The plain language of § 510 omits a refusal to "rehire," "hire" or to take any action related to hiring from its enumeration of prohibited acts. Plaintiffs argue that this makes no difference because one definition of "discriminate" -- "to make a difference in treatment . . . on a basis other than merit," *see* Webster's Ninth New Collegiate Dictionary (1986) -- encompasses hiring decisions. We reject this invitation to construe the word "discriminate" out of context. Instead, we heed the Supreme Court's instruction that we "must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *United States National Bank of Oregon v. Independent Insurance Agents of America*, 508 U.S. 439, 455, 124 L. Ed. 2d 402, 113 S. Ct. 2173 (1993) (quoting *United States v. Heirs of Boisdore*, 49 U.S. (8 How.) 113, 122, 12 L. Ed. 1009 (1849)). This background makes clear that the inclusion of "discriminate" in the text was not intended to bear the broad meaning suggested by plaintiffs.

The more limited meaning of "discriminate" becomes clear when we consider the manner in which Congress

traditionally has proscribed discrimination in hiring under employment regulatory schemes. When § 510 is compared with the statute upon which it was modeled--section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3)[5]--the omissions in § 510 reveal that Congress did not intend to regulate hiring decisions under ERISA.

In the NLRA, Congress specifically stated that it "shall be an unfair labor practice for an employer . . . (3) by discrimination in regard to hire or to discharge any individual or otherwise to discriminate against any individual." *Id.* (emphasis added). Thus, Congress knows how to forbid discrimination in hiring, and when it wishes to do so it will use the word "hire." Cf., *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 485, 134 L. Ed. 2d 121, 116 S. Ct. 1251 (1996) ("Congress . . . demonstrated in CERCLA that it knew how to provide for the recovery of cleanup costs, and that the language used to define the remedies under the RCRA does not provide that remedy.").

Based on Congress's past usage, if Congress intended that § 510 apply to hiring practices, it would have included the word "hire" in the string of denominated employment

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[5] "The legislative history of ERISA does make clear . . . that the statute was modeled on § 8(a)(3) of the National Labor Relations Act." *Stiltner v. Beretta U.S.A. Corp.*, 74 F.3d 1473, 1483 (4th Cir. 1996); 119 Cong. Rec. 30374 (Statement of Sen. Hartke), reprinted in 2 Legislative History of the Employee Retirement Income Security Act of 1974, at 1775 (1976) ("The language [of ERISA § 510] parallels section 8(a)(3) of the National Labor Relations Act . . . .").

practices. We agree with the District Court that the express language used to regulate hiring practices in the NLRA, as well as other employment statutes,[6] implies that the omission of such language from § 510 was deliberate.[7]

ii. The purpose of § 510

We are also convinced that we should reject the vested plaintiffs' broad definition of "discriminate" because it would "produce a result at odds with the purposes underlying the statute." *Watt v. Western Nuclear*, 462 U.S. 36, 56, 76 L. Ed. 2d 400, 103 S. Ct. 2218 (1983); *see also Brotherhood of Locomotive Engineers v. Atchison, Topeka, and Santa Fe Railroad*, 516 U.S. 152, 157, 133 L. Ed. 2d 535, 116 S. Ct. 595 (1996) (interpreting statute in accordance with purpose of statutory scheme). ERISA is designed to protect benefits promised to an employee arising from a pre-existing employment relationship. Though the vested plaintiffs once

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[6] Other employment statutes that proscribe discriminatory hiring, such as Title VII, the Age Discrimination in Employment Act, and the Americans with Disabilities Act, do so explicitly. *See, e.g.*, 42 U.S.C. § 2000e-2(a)(1) (employer may not "fail or refuse to hire . . ."); 29 U.S.C. § 623(a)(1)(same); 42 U.S.C. § 12112 (a) & (b)(5)(B) ("No covered entity shall discriminate . . . in regard to job application procedures, the hiring, advancement, or discharge of employees; the "term 'discriminate' includes--(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual . . .") (emphasis added).

[7] Thus we need not reach the question of whether "discriminate" is similar in nature to the preceding terms "discharge, fine, suspend . . ." under the ejusdem generis canon of statutory construction.

had an employer-employee relationship with Mack, their complaint does not address a deprivation of any pre-existing ERISA or recall rights arising out of their former employment.

Instead, plaintiffs seek protection as job applicants. Such protection is inconsistent with Congress's purpose in enacting ERISA, as evidenced by express statutory language, opinions interpreting § 510, and by that provision's legislative history. *See* generally James F. Jorden, Waldemar J. Pflepsen, Jr., & Stephen H. Goldberg, Handbook on ERISA Litigation § 8.01 [B]-[C] (2d ed. 2000 Supplement).

As an initial matter, it is axiomatic that "ERISA neither mandates the creation of pension plans nor in general dictates the benefits to be afforded once a plan is created." *Smith v. Contini*, 205 F.3d 597, 602 (3d Cir. 2000). It is only after an employer chooses to provide a pension plan that ERISA mandates vesting and other rights designed to safeguard employees' expectations with regard to promised benefits. Indeed, the explicitly stated policy behind ERISA is Congress's desire to protect employees' promised benefits. 29 U.S.C. § 1001(a).

Section 510 establishes an important check on employers' ability to undermine ERISA's protections for promised benefits: "Congress viewed [§ 510] as a crucial part of ERISA because, without it, employers would be able to circumvent the provision of promised benefits." *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 143, 112 L. Ed. 2d 474, 111 S. Ct. 478 (1990); *Inter-Modal Rail Employees Ass. v. Atchison, Topeka, and Santa Fe*, 520 U.S. 510, 515, 137 L. Ed. 2d 763, 117 S. Ct. 1513 (1997) ("§ 510 helps make

promises credible") (citing *Heath v. Varity Corp.*, 71 F.3d 256, 258 (7th Cir. 1995)). Section 510 safeguards promised benefits by prohibiting "unscrupulous employers from discharging or harassing their employees in order to keep them from obtaining vested pension benefits." *Gavalik*, 812 F.2d at 851. Congress has also provided stiff criminal penalties for employers that take coercive action to prevent employees from obtaining benefits. 29 U.S.C. § 1141; *West v. Butler*, 621 F.2d 240, 243 (6th Cir. 1980).

While termination of employment is the prototypical action Congress intended to cover in § 510, that section also reaches employee harassment which falls short of firing. Legislative history reveals that the term "discriminate" was used in order to reach conduct "which does not say that one is fired, but makes living such a hell that a person wishes he did not have to hang on and endure," 119 Cong. Rec. 30374 (Statement of Sen. Hartke), reprinted in 2 Legislative History of the Employee Retirement Income Security Act of 1974, at 1774-75 (1976);[8] *see also McGath v. Auto-Body North Shore,*

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[8] Plaintiffs also claim that § 510's legislative history supports a broader interpretation of the term "discriminate." We disagree. The provisions upon which they rely discuss "interference with [an employee's] rights which are protected under the Act," or "discriminatory conduct toward participants and beneficiaries which is designed to interfere with the attainment of vested benefits or other rights under the bill" H.R. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess. (1974) (Joint Explanatory Statement of the Committee of Conference), reprinted in 1974 U.S.C.C.A.N. 5038, 5110 & 5188. These passages contain no suggestion that Congress intended to protect the rights of job applicants in addition to the rights arising from an employer-employee relationship.

Inc., 7 F.3d 665, 669 (7th Cir. 1993) (§ 510 "protects the employee not only against the classical forms of employer harassment that might occasion the loss of benefits, but also against the more atypical forms of employer misconduct that can produce the same result.").[9] Congress's intent to provide a broad array of safeguards for existing employment relationships by no means suggests, however, that it intended to regulate actions taken against a potential employee.

Unlike a discharge or other workplace harassment, a failure to hire does not amount to a circumvention of promised benefits because job applicants who have yet to be hired have not been promised any benefits. In fact, we have held that "discriminate" as used in § 510 is "limited to actions affecting the employer-employee relationship." *Haberern v. Kaupp Vascular Surgeons Ltd.*, 24 F.3d 1491, 1503 (3d Cir. 1994); accord *Fischer v. Philadelphia Elec. Co.*, 96 F.3d 1533, 1543 (3d Cir. 1996) ("under the law of this circuit, suits for discrimination under § 510 are 'limited to actions affecting the employer-employee relationship'"); *see also Andersen v. Chrysler Corp.*, 99 F.3d 846, 856 (7th Cir. 1996) ("§ 510 applies only in instances in which an employer wrongfully alters the employment relationship to prevent benefits rights from vesting"); *Woolsey v. Marion*

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[9] To draw on an example from popular culture, consider the plight of Milton in Michael Judge's movie Office Space. Although Milton's employer had decided to lay him off years ago, his manager never bothered to formally discharge him. Instead the company attempted to realize its desire to be rid of Milton by moving his office to a dark basement and asking Milton to help to get rid of the cockroaches there.

Labs, Inc., 934 F.2d 1452, 1461 (10th Cir. 1991) (plaintiff had no actionable claim under § 510 when "Administrators' denial has not affected Woolsey's employment situation").[10] The language enacted by Congress simply does not extend to actions taken before an employer-employee relationship exists.

Our recent decision in *Eichorn v. AT&T Corp.*, 248 F.3d 131 (3d Cir. 2001), is not to the contrary. That case involved a restrictive covenant preventing employees of a divested subsidiary company from returning to the parent corporation group until after their pension bridging rights had lapsed. *Id.*248 F.3d at 149. The stated purpose of the restrictive covenant was to prevent experienced employees from leaving the subsidiary when it was purchased by a third-party. The third-party, however, determined not to offer a defined pension benefit program. Thus, the restrictive covenant had the effect of separating the employees from the parent company in a manner that eliminated their accrued pension benefits. We concluded that plaintiffs had averred

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[10] The Fifth and Sixth Circuits have stated that § 510 "reaches further than the employment relationship" in cases where plaintiffs are discriminated against because they have exercised their ERISA rights. *Mattei v. Mattei*, 126 F.3d 794, 804 (6th Cir. 1997); *Heimann v. Nat'l Elevator Industry Pension Fund*, 187 F.3d 493, 507 (5th Cir. 1999). We reject these cases to the extent they conflict with our decision in Haberern, which is binding and, we believe, correctly decided. Moreover, both the Fifth and Sixth Circuit's holdings are distinguishable from the case at hand. They address rights stemming from a pre-existing employment relationship, rather than rights arising from a prospective employment relationship.

sufficient facts to state a claim against the parent company under § 510.

In sum, § 510 simply does not require that employers blind themselves to the effect on future pension liability when making hiring decisions. Thus we will implement Congress's policy by following the construction of § 510 that is best supported by the text and by the limited purpose of ERISA.

IV. CONCLUSION

Plaintiffs, in their ERISA claims, have attempted to stretch ERISA's statutory language well beyond the purpose intended by Congress. Today we decline their invitation to extend the protections of § 510 of ERISA to cover Mack's decision not to rehire plaintiffs. We will, therefore, affirm the granting of summary judgment in favor of defendant Mack Trucks, Inc.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 00-4414

[Filed February 21, 2002]

LARRY BECKER; STEPHEN CAPKOVIC, III; LEE R. CHRIST; JAMES DAQUISTO; MICHAEL DREHER; RANDY FREY; ROBERT GASTON; CHARLES GROHOTOLSKI; BARRY JONES; JOHN JUDD; DENNIS KNOPF; WAYNE LABATY; WILLIAM LEHMAN; THOMAS LITCHAUER; BRUCE MCFARLAND; MICHAEL MEYERS; SAMUEL OLIVERIA; ROBERT PETERS; SHERWOOD PETERS; THOMAS ROBERTS; KATHERINE TAKACS; SCOTT TAKACS; ANTHONY TRATNYEK; CLAIRE WILLIAMS; DENNIS C. ACKER; RICHARD BALLIET; ALEXANDER BANDI, JR.; STEPHEN R. BECKER; TIMOTHY S. BELLER; ANITA L. BELLES; THOMAS F. BENNER,

JR.; JUDITH A. BINDER; DAVID)
J. BOBO; JAMES P. BURGER,)
JR.; RALPH A. CHRISTMAN;)
LAVERN R. CLATER; ALFRED)
W. DILABIO; MICHAEL A.)
DILCHER; WAYNE R. ERNST;)
DANIEL H. FREED; EDWARD)
A. FREED; JOHN L. GOLDEN;)
MANUEL I. GUEDES; DENNIS)
P. HAFER; SHEILA K.)
HANSLER; CLAYTOR)
HOWARD; JEFFREY HUSACK;)
JAMES P. KALAVODA; JOZEF)
KAZIMIR; JOHN S.)
KERBACHER; ANTHONY A.)
KISS; JOSEPH J. KISS;)
STEPHEN J. KISS; MICHAEL)
KLUCAR; DENNIS G.)
KOEHLER; ANDREW J.)
KORUTZ; RICHARD D.)
DRATZER; THOMAS A.)
MARSHMAN; RONALD P.)
MARCKS; JAN A. MERKEL;)
JANE L. MICHAEL; CHESTER)
C. MILLER; PAUL J. MISHKO,)
JR.; DENNIS R. PASCOE;)
THOMAS E. PRUZINSKY;)
JOSEPH M. RICE; BRUCE L.)
ROTHROCK, JR.; EDWARD R.)
SAJT; GERALD ROBERT)
SCHUECK; PETER M.)
SINCLAIR; DAVID W. SMITH;)
DALE R. SNYDER; MARYANN)
J. SOSNOWSKI; DARREL C.)
STOFFLET; GEORGE M. SZEP;)

JOHN J. SZILAGYI; BRUCE TORRENCE; CHERYL A. YANDRASITS,

Appellants

v.

MACK TRUCKS, INC.

Appeal from the United States District Court for the Eastern District Of Pennsylvania
(D.C. Civil Action No. 00-cv-01338)
Honorable Franklin S. Van Antwerpen, District Judge.

JUDGES:
Before: ROTH, AMBRO and FUENTES, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued on September 26, 2001.

On consideration whereof, it is now here ORDERED AND ADJUDICATED by this Court that the judgment of the said District Court entered November 30, 2000, be, and the same is hereby affirmed. Costs taxed against appellant. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ _____
Clerk

Dated: 21 February 2002

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 00-1338

[Filed November 30, 2000]

CLAIRE WILLIAMS, et al.,	)
Plaintiffs	)
	)
v.	)
	)
MACK TRUCKS, INC.,	)
	)
Defendant	)
	)

ORDER

And now, this 30th day of November, 2000, it is hereby ORDERED that Judgment is entered in favor of the defendant, Mack Trucks, Inc., and against plaintiffs on all claims.

BY THE COURT

/s/ _____
Franklin S. Van Antwerpen
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 00-1338

[Filed November 30, 2000]

CLAIRE WILLIAMS, et al., Plaintiffs	)
v.	)
MACK TRUCKS, INC., Defendant	)

MEMORANDUM AND ORDER

I. INTRODUCTION

The issue before this court is whether plaintiffs, 78 former employees of defendant Mack Trucks, Inc. ("Mack Truck"), or defendant Mack Truck itself are entitled to summary judgment in the parties' dispute regarding whether Mack Truck's refusal to rehire plaintiffs in order to avoid incurring greater pension liability violates Section 510 of the

Employee Retirement Income Security Act ("ERISA") (29 U.S.C. § 1140). Plaintiffs' original Complaint, filed on March 13, 2000 named 24 former employees who claimed that Mack Truck had refused to rehire them in violation of § 510. Plaintiffs filed an Amended Complaint on June 2, 2000 in which they added 54 former employees, bringing the total number of plaintiffs to 78. Mack Truck filed their Answer to Defendant Mack Trucks, Inc. to the Amended Complaint and Affirmative Defenses on June 30, 2000, denying any violation under § 510. On October 6, 2000, the two parties filed a Stipulation of Facts, to which they attached a copy of Appendix A to the Mack-UAW Master Agreement, entitled the Mack-UAW Pension Plan ("Plan").

We have reviewed both parties' submissions and find that those plaintiffs whose benefits were not vested at the time their termination ("non-vested plaintiffs") do not have proper standing to bring suit under ERISA. §§ 3(7) 8: 502(a)(1)(B) (29 U.S.C. §§ 1002(7) & 1132(a)(1)(B)). With regard to those plaintiffs whose benefits were vested prior to termination ("vested plaintiffs") and who therefore do have proper standing to sue, we find that there are, no genuine issues of material fact. We have placed the burden of proof on those plaintiffs to establish the existence of elements essential to their case under Fed.R.Civ. P. 56 (as they would have the burden of proof at trial), and conclude that Mack Truck is entitled to judgment as a matter of law, as its refusal to rehire in avoidance of increased pension liability is not a prohibited activity under ERISA § 510.

I. BACKGROUND

Defendant Mack Truck manufactures and distributes heavy-duty trucks. It operates an assembly plant in Macungie, Lehigh County, Pennsylvania and, until 1987, operated machining and fabrication plants in Allentown, Pennsylvania. (Stip. at ¶3-4.) Employees in both locations were represented by the United Automobile, Aerospace and Agricultural Implement Workers ("UAW") and Local 677, UAW ("Local 677"). Plants in Allentown and Macungie were covered by the Mack-UAW Master Agreement as well as local agreements applicable to each plant. Appendix A to the Master Agreement as well as local agreements applicable to each plant. Appendix A to the Master Agreement is the Mack-UAW Pension Plan ("Plan"), which is subject to renegotiations every time the Master Agreement is renegotiated. (Stip. at ¶8.) Prior to January 1, 1989, an employee covered by the Plan became vested for purposes of the Plan after ten years of service. On and after January 1, 1989, employees became vested after five years. (Stip. at ¶10; Stip. Exh. 1 Art. IV, Sec. 4.)

When Mack closed its facilities in Allentown in 1987, a number of employees lost their jobs. Some of these employees transferred or were absorbed into other Mack Plants, some accepted a cash payment ("dislocation benefit") to relinquish their seniority rights, and others were simply laid off and exhausted their recall rights under the Master Agreement. (Stip. at ¶15.) In 1997, a combination of rising production needs and workforce attrition made it necessary for Mack Truck to hire new employees at the Macungie plant. (Stip. at ¶16.) Although former employees were initially the first to be offered new jobs, Mack Truck soon realized that

hiring former employees created a future pension liability disproportionately greater than that incurred by hiring employees without past pension credit under the Plan, (Stip. at ¶17-18.) In July 1997, Mack Truck adopted a policy of refusing to rehire former employees with credited service under the Plan. All 78 plaintiffs in this action are former Mack Truck employees who were not considered for employment due to this pension liability avoidance policy, and who are not entitled to recall under the Mack-UAW Master Agreement. (Slip. at ¶23.)

Plaintiffs request injunctive and monetary relief against Mack Track on the grounds that Mack Truck's policy against rehiring former employees for the purpose of avoiding increased pension liability violates § 510 of ERISA (29 U.S.C. § 1140) (Am. Compl, At 45-46). Mack Truck denies plaintiffs' claims, stating that plaintiffs whose benefits had not vested prior to termination are without standing to bring suit within the meaning of ERISA §§ 3(7) & 502(a)(1)(B) (29 U.S.C. §§ 1002(7) & 1132(a)(1)(B)), and that Mack Truck's refusal to rehire plaintiffs in avoidance of increased pension liability is not prohibited discriminatory activity under ERISA § 510. We agree.

II. DISCUSSION

We have jurisdiction over this matter pursuant to 28 U.S.C. § 1331. We find that non-vested plaintiffs are without standing to bring suit, that there is no genuine issue of material fact precluding us from granting summary judgment to either party, and that Mack Trucks is entitled to judgment as a matter of law. These findings and ruling are explained below.

A. Standing of the Non-Vested Plaintiffs

A plaintiff may bring a civil action under ERISA if he is a "participant or beneficiary" of a retirement plan, seeking to "recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B), The statute defines a participant as "any employee or former employee of an employer... who is or may become eligible to receive a benefit of any type from an employee benefit plan ...."29 U.S.C. § 1002(7). The Supreme Court elaborated on this definition, explaining that:

> In our view, the term "participant" is naturally read to mean either "employees in, or reasonably expected to be in, currently covered employment," or former employees who "have... a reasonable expectation of returning to covered employment" or who have "a colorable claim" to vested benefits. In order to establish that he or she "may become eligible" for benefits, a claimant must have a colorable claim that (1) he or she will prevail in a suit for benefits, or that (2) eligibility requirements will be fulfilled in the future... A former employee who has neither a reasonable expectation of returning to covered employment nor a colorable claim to vested benefits, however, simply does not fit within the [phrase] "may become eligible."

Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 117-18 (1989) (citations omitted). There is no dispute that plaintiffs

are all former employees of Mack Truck for purposes of § 1002(7). (Stip. at ¶¶22-24.) As a result, their standing under § 510 of ERISA depends upon whether they have either a "reasonable expectation of returning to covered employment" or "'colorable claim' to vested benefits." *Firestone Tire*, 489 U.S. at 117. We find that plaintiffs whose benefits were not vested under Mack Truck's Plan at the time of their initial termination ("non-vested plaintiffs") do not have the standing to bring suit against their former employer under ERISA § 510.[11]

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[11] The Plan defines vested employees as "any employee who shall incur a break in his seniority on or after January 1, 1976: (i) who then shall have 10 or more years of vesting service, or (ii) who shall incur a break in seniority on or after January 1, 1989 and who shall then have 5 or more years of vesting service." (Stip. Exh. 1, at 14.) Based on this definition, the parties agree that the following plaintiffs were terminated before their benefits vested:

Robert Gaston (Count 8)
Charles Grohotolski (Count 9)
William Lehman (Count 14)
Scott Takacs (Count 23)
Anthony Tratnyek (Count 24)
Alexander Bandi, Jr. (Count 26)
Thomas F. Benner, Jr. (Count 30)
Judith A. Warmkessel Binder (Count 31)
David J. Bobo (Count 32)
Daniel H. Freed (Count 38)
John L. Golden (Count 40)
Anthony A. Kiss (Count 48)
Joseph J. Kiss (Count 49)
Jane L. Michael (Count 58)
Thomas E. Pruzinsky (Count 62)

Plaintiff's do not have a reasonable expectation of

Joseph M. Rice (Count 63)
Peter M. Sinclair (Count 67)
Darrel C. Stofflet (Count 71)
John J, Szilagyi (Count 73)
Cheryl A. Yandrasits (Count 75)
Richard Balliet (Count 76)
Jeffrey Husak (Count 77)

(*See* Am. Compl. at 7-45; Answer to Def. to Am Compl. & Afl. Defenses at 3-33.) The parties were unable to agree as to the status of the following plaintiffs' benefits:

Larry Becket (Count 2)
James P. Burger (Count 33)
Michael Klucar (Count 51)
Ronald P. Marcks (Count 56)
David W. Smith (Count 68)
Dale R. Snyder (Count 69)

(Stip. at ¶24.) Claire Williams' (Count 1) benefits status is also unclear as plaintiffs' Amended Complaint does not specify precisely how long Ms. Williams worked for Mack Truck before being terminated, stating only that "Plaintiff Claire Williams worked for Mack Truck from October 4, 1977 to 1987." (Am. Compl. at 8.) As a result, we were unable to determine if her benefits were vested and in turn if she has standing to pursue her claims against Mack Truck under § 510. We conclude, however that because Mack Truck is entitled to summary judgment it is unnecessary for us to perform a detailed analysis of the remaining plaintiffs' benefits status. We instead rely on our ruling that non-vested plaintiffs do not have standing to bring suit against Mack Truck under ERISA § 510 and move on to consider the merits of the vested plaintiffs' claims.

returning to covered employment. The Third Circuit has found that former employees have no such expectation

> [W]here the[ir] collective bargaining agreement expressly covers recall rights, and former employees were not rehired before the expiration of those rights... plaintiffs had a reasonable expectation only to the rights as defined by the agreement.

Shawley v. Bethlehem Steel Corporation, 989 F.Supp. 652, 658 (3d Cir. 1993). Plaintiffs recall rights under the Plan have expired, (stip. at ¶25), and they have identified no other contractual entitlements to future employment with Mack Truck. As a result, they do not have standing under the definition of a reasonable expectation of returning to covered employment relied on by the Third Circuit in *Shawley*.[12]

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[12] Plaintiffs do not dispute this conclusion with respect to *Shawley*. (Mot. Pls. Summ. J. at 9 n.1 .) They instead argue that our analysis should depend not on the status of plaintiffs' contractual recall rights, but on a determination of whether plaintiffs could have reasonably expected their benefits to vest "but for" Mack Trucks' refusal to rehire them. (*Id.*) Although this "but for" test has been applied outside this jurisdiction, *see, e.g., Vartanian v. Monsanto Co.*, 14 F3d 697 (1st Cir. 1994); *Christopher v. Mobile Oil Corp.*, 950 F2d 1209 (5th Cir. 1992), it is not clear that it is controlling authority in the Third Circuit. *Compare Shawley*, 989 F.2d at 658-59 (rejecting plaintiff's "but for" argument without discussing the test's authority); Ronald Dean & Karen M. Wahle, *Suits by Beneficiaries Against Plans or Employers to Recover Benefits*, 54 ALI-ABA 239, 247 (2000) (citing *Shawley* as a case that "refused to adopt 'but for' standing"), with *Flanagan v. Inland Empire Elec. Workers Pension Plan & Trust*, 3 F.2d

1246, 1251 (9th Cir. 1993) (mentioning *Shawley* court's application of the "but for" test); *DiFederico v. Rolm Co.*, 1995 WL 710561, at *3 (E.D. Pa. Nov. 30, 1995) (claiming that the Third Circuit adopted the "but for" test in *Shawley*). Moreover, even if we accept the "but for" test as an appropriate method of determining plaintiffs' standing, we are nonetheless bound by the *Shawley* court's application of it:

> The *Christopher* court specifically held that a former employee had no standing to sue for ERISA benefits unless the employer's action "in and of itself divested aggrieved parties of their status as covered employees." Bethlehem Steel's refusal to rehire them, however, did not "in and of itself" strip plaintiff's of their employee status. Plaintiffs were not terminated, constructively discharged, or tricked into retiring... they were laid off because of an economic downturn in the steel industry. Therefore, even under a "but for" analysis, plaintiffs would lack standing to sue under ERISA.

Shawley, 989 F.2d at 659. The facts at issue here are very similar to those in *Shawley*. Plaintiffs were originally laid off in part due to plant and distribution center closings in Allentown, Pennsylvania and in Bridgewater and Somerset, New Jersey. (Stip. at ¶ 14.) There is no evidence that employees were terminated, constructively discharged, or tricked into retiring. All evidence, particularly the fact that later increases in production requirements led to new hiring, points to the layoffs being the result of Mack Trucks' declining production needs. (Stip. at ¶16.) As a result, we conclude that even if the "but for" test is the appropriate standard to determine if plaintiffs have a reasonable expectation of returning to covered employment, the facts at issue here do not support such

Now vested plaintiffs likewise do not have colorable claim to vested benefits sufficient to satisfy the *Firestone* standard. The Third Circuit found that non-vested, credited service "gave rise to only a forfeitable benefit" and that a "contingent claim for future benefits does not satisfy the dictates of *Firestone*." *Shawley*, 959 F.2d at 657; *see also Agathos v. Starlite Motel*, 60 F.3d 143, 151 n. 10 (3d Cir. 1995) ("We have previously held that a claim for credited services does not give rise to a 'colorable claim' to vested benefits."). *Shawley* involved the denial of ERISA standing to a group of non-vested former employees who claimed that the Rule of Parity, 29 U.S.C. § 1053(b)(3)(D)(i)(II), a provision permitting post-termination retention of credited service for a period equal to the duration of prior employment, preserved their credited service as vested, contingent on the termination of their benefit plan during the running of the Rule. *See Shawley*, 989 F.2d at 656-57. The *Shawley* court rejected this argument, finding that contingent benefits were not vested for purposes of conferring standing under *Firestone*. *See id.* at 657.

Plaintiffs in this case attempt to distinguish *Shawley* by claiming that the Rule of Parity does not apply to their benefit agreement with Mack Truck, and therefore that their benefits are vested because they retain their credited service indefinitely after termination. We do not find this argument persuasive. The court in *Shawley* did not conclude that plaintiffs' benefits were not vested because they were only temporarily contingent under the Rule of Parity. On the

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a finding and plaintiffs are therefore without standing to sue Mack Truck under ERISA § 510.

contrary, the Shawley court came to the even clearer determination that any contingent benefits, regardless of the duration of their contingency, were not vested for purposes of defining a "participant" under 29 U.S.C. § 1132(a)(1)(B) and *Firestone*. *See Shawley* 989 F.2d at 657 ("A contingent claim for future benefits does not satisfy the dictates of *Firestone*.") As a result, we find, consistent with the Third Circuit's ruling in *Shawley*, that non-vested plaintiffs do not have a colorable claim to vested benefits against Mack Truck, and therefore, in conjunction with our finding that plaintiffs do not have a reasonable expectation of returning to covered employment, that such plaintiffs are without standing to bring suit against defendant under § 510 of ERISA (29 U.S.C. § 1140).

B. Summary Judgment Standard

The court shall render summary judgment "if the pleadings, depositions, answer to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R, Civ. P. 56(c). An issue is "genuine" only if there is a sufficient evidentiary basis on which a reasonable jury could find for the nonmoving party, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986), and a factual dispute is "material" only if it might affect the outcome of the suit under existing law. *Id.* at 248. Although all inferences must be drawn and all doubts resolved in favor of the nonmoving party, *see United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962); *Wicker v. Consol. Rail Corp.*, 142 F.3d 690, 696 (3d Cir. 1998), "[t]he moving party is 'entitled to a judgment as a matter of law' [if] the nonmoving party has failed to make a sufficient showing on an essential element of her case with

respect to which she has the burden of proof [at trial]." *Celotex v. Catrett*, 477 U.S. 317, 323 (1986); *see Anderson*, 477 U.S. at 248-49 (explaining that the nonmoving party bears the burden of demonstrating the existence of evidence that would support a jury finding in its favor).

There is no genuine issue of material fact in this case; the parties have stipulated to all relevant facts, and neither party has raised any potential issues in their respective memorandum in support of their motions for summary judgment. As a result, we find that both parties have implicitly agreed to the facts as stated herein. (*See* Stip.) The remaining question, then, under Fed. R, Civ. P. 56 is whether plaintiffs or Mack Truck are entitled, based on the undisputed facts, to judgment under Section 510 of the Employee Retirement Income Security Act ("ERISA"). We address this issue below.

C. Vested Plaintiffs' Discrimination Claim

Defendant Mack Truck is entitled to summary judgment as plaintiffs have failed to make a sufficient showing that Mack Truck's refusal to rehire former employees was a discriminatory activity in violation of § 510 of the Employee Retirement Income Security Act ("ERISA"), Section 510 states that:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan... or for the purpose of

> interfering with the attainment of any right to which such participant may become entitled under the plan ....

29 U.S.C. § 1140. In order to establish a prima facie case under the statute, an employee must demonstrate "(1) prohibited employer conduct (2) taken for the purposes of interfering (3) with the attainment of any right to which the employee may become entitled." *Gavalik v. Continental Can Co.*, 812 F.2d 834, 852 (3d Cir. 1987). In this case, both parties agree that Mack Truck acted with the purpose of preventing benefit increases to previously terminated employees. (Stip. at ¶¶18-23.) The only remaining issue, then, is whether Mack Truck engaged tn prohibited conduct under § 510 by refusing to rehire plaintiffs in an attempt to avoid greater benefit liability. Applicable case law and the statute's legislative history both support a finding in favor of Mack Truck's motion for summary judgment.

1. Case Law

Relevant case law supports our finding that an employer's refusal to rehire does not constitute prohibited activity under § 510. In *Shawley .v. Bethlehem Steel Corporation*, 784 F.Supp. 1200 (W.D. Pa. 1992), *aff'd on other grounds*, 989 F.2d 652 (3d Cir. 1993), the district court, relying on facts nearly identical to those at issue here, found that an employer's refusal to rehire previously terminated employees "because of the potential pension liability" did not violate § 510's prohibition on the discriminatory administration of benefit plans. *Id.* at 1202. The court explained that:

> Plainly, the words of [ERISA] § 510] prohibit discharging, firing, suspending, expelling or disciplining employees to interfere with their pension rights oi potential pension rights. Just as plainly, the words of the statute do not expressly prohibit refusals to hire an employee based on consideration of the employee's potential economic cost and benefit to the employer.

Id. at 1203. This court found that refusals to rehire do not constitute impermissible discrimination under § 510 in *Feret v. CoreStates Financial Corporation*, 1998 WL 426560 (E.D. Pa. July 27, 1998), in which former CoreStates employees were rehired by an independent firm under contract with CoreStates, a process that rendered the rehired employees ineligible for CoreStates' benefit plan. The court found that CoreStates' plan to avoid further benefit liability was permissible under § 510, stating that:

> Section 510 was designed primarily to prevent "unscrupulous employers from discharging or harassing their employees in order to keep them from obtaining vested pension rights," A "fundamental prerequisite to a Section 510 action is an allegation that the employer-employee relationship... was changed in some discriminatory or wrongful way." Offering a job or the chance to continue employment has never been prohibited employer conduct and "it would be a ludicrous distortion of ERISA to make it so." The court finds that CoreStates' act of rehiring plaintiffs to non-

benefit positions is not actionable under § 510.

Id. at *4 (citations omitted). The Ninth Circuit also found that rehiring to avoid or limit an employer's pension liability is not prohibited activity under § 510. In *West v. Greyhound Corporation*, 813 F.2d 951 (9th Cir. 1987), ConAgra, having just purchased Greyhound, offered to rehire only those former Greyhound employees that agreed to a reduction in their future benefits. The court found this arrangement valid under § 510, explaining that:

> As an employee has no ERISA right to future, unaccrued benefits, he cannot claim discrimination because a purchaser of business assets will not hire him for insisting on unacceptable terms... In summary, we hold that no violation of section [510] of ERISA is shown where the seller of a business terminates employment... and the purchaser refuses to hire any of the employees because they refuse to accept a reduction of unaccrued employee benefits.

Id. at 955. In the case at hand, Mack Truck refused to rehire former employees on the basis of its potential benefit liability (Stip. at ¶¶19-21.) This decision is directly analogous to those at issue in *Shawley*, *Feret*, and *West*, in which the courts found that refusal to rehire in order to avoid greater pension liability is not prohibited conduct under § 510. As a result, we find that relevant case law supports our conclusion that Mack Truck is entitled to judgment as a matter of law against plaintiffs under ERISA § 510.

Plaintiffs rely on cases both in and outside this jurisdiction in an attempt to discredit the court's decision in *Shawley* and garner support for the proposition that Mack Truck's activities do indeed violate § 510.[13] They first claim that the failure to rehire was implicitly found to be within the

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[13] Plaintiffs also argue that the word "discriminate" in § 510 includes an employer's refusal to rehire in order to limit pension liability. They rely on the dictionary definition of discrimination as a "difference in treatment or favor on a basis other than individual merit" and claim that Mack Truck's refusal to rehire them represents just such a difference in treatment between plaintiffs, former employees who commanded greater pension commitments from Mack Truck, and the new employees hired to avoid such increased liability (*See* Mot. Pls. Summ J, at 16.) Plaintiffs then challenge the means of statutory construction applied in *Shawley v. Bethlehem Steel Corporation*, 784 F.Supp. 1200, 1203 (W.D. Pa. 1992), in which the court found that the language of § 510 does not apply to refusals to rehire. This conclusion was echoed by the Third Circuit in *Haberern v. Kaupp Vascular Surgeons Ltd. Defined Benefit Pension Plan*, 24 F.3d 1491 (3d Cir. 1994), in which the court found that suits for discrimination under § 510 are "limited to actions affecting the employer-employee relationship." *Id.* at 1503. It seems clear that hiring decisions are outside the scope of the employer-employee relationship, as the sole purpose of those decisions is to establish such a relationship where none exists. As a result, because of the depth of judicial discussion on the scope of § 510, we refrain from engaging in any detailed analysis of individual definitions or statutory construction, We instead conclude, consistent with the weight of binding authority, that hiring decisions do not fall within the definition of prohibited discriminatory conduct under § 510, and that plaintiffs' claim that this section applies to Mack Truck's refusal to rehire them on the basis of its potential pension liability is therefore not valid under the statute.

scope of § 510 when the Fourth Circuit, in *Conkwright v. Westinghouse Electric Corporation*, 933 F.2d 231 (4th Cir, 1991), ruled that "[Section 510] extends to claims by vested employees for intentional inference with their ability to accrue additional benefits." *Id.* at 238. Plaintiffs fail to recognize, however, that the termination in *Conkwight* constituted an express violation of § 510 in a way that Mack Truck's failure to rehire plaintiffs did not. *See* 29 U.S.C. § 1140 (prohibiting discharge, but not failure to rehire, "for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan"). Because the facts in *Conkwright* so clearly implicated § 510, it would be inappropriate to read the court's decision to expand the statute's scope. We find, because plaintiffs were not employed by Mack Truck and, as a result, were not terminated and had no rights to future benefits under the Plan, that the language in *Conkwright* should not be read to include plaintiffs' situation and is therefore inapplicable to the case at hand.

Plaintiffs also claim that *Shawley* conflicts with the Third Circuit's ruling in *Gavalik v. Continental Can Company*, 812 F.2d 834 (3d Cir. 1987). According to plaintiffs, *Gavalik* involved a pension liability avoidance scheme through which an employer violated § 510 by refusing to recall terminated employees in order to prevent them from receiving early retirement benefits. (Mot. Pls. Summ. J. at 13.) In fact, *Gavalik* focused not on the employer's failure to recall terminated employees, as plaintiffs' suggest, but instead on the employer's sophisticated tracking system established to identify those employees targeted for layoff. This limited inquiry is reflected in plaintiffs argument in that case:

> We are not attempting to prove in this case, - Although it might very well be an independent violation, the Court will not be called upon [decide] in this case that a failure to call in some discriminatory fashion constitutes a violation of ERISA, although it well may. But that's not what this case is about. *This case is about the selection and designation for layoff of people.*

Id. at 855 n.34 (emphasis in original). The court in *Gavalik* did not address the question of whether the failure to rehire constitutes protected activity under § 510, and therefore plaintiffs' claim that it is inconsistent with the court's ruling in *Shawley* is unfounded.

Consistent with the weight of applicable case law, we find that Mack Truck is entitled to a judgment that, as a matter of law, its refusal to rehire plaintiffs was permissible under § 510 of ERISA.

2. Legislative History

The legislative history of § 510 further supports our conclusion that the statute does not prohibit an employer from refusing to rehire former employees in order to limit that employer's pension liability.[14] The drafters of §510 explained

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[14] Although not necessarily conclusive, we also consider the plain language of § 510 relevant to our understanding of congressional intent in drafting the statute. As cited above, § 510 makes it "unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate" against a participant in, or

their purpose in enacting ERISA as follows:

> The Congress finds that... despite the enormous growth in [employee benefit] plans many employees with long years of employment are losing *anticipated retirement benefits* owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay *promised benefits* may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries

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beneficiary of, a benefit plan for the purpose of limiting an employer's liability under that plan. 29 U.S.C. § 1140. The provision does not in any way refer to hiring in its list of prohibited activities. By contrast, the National Labor Relations Act ("NLRA"), after which ERISA was modeled, explicitly forbids employers from discriminating "in regard to hire." 29 U.S.C. § 158(a)(3); *see also Stiltner v. Beretta U.S.A. Corp.*, 74 F.3d 1473, 1483 (4th Cir. 1996) ("The legislative history of ERISA § 510 does not make clear, however, that the statute was modeled on § 8(a)(3)of the National Labor Relations Act."); *see also* 119 Cong. Rec. 30374, *reprinted in* Subcomm. on Labor, Senate Comm. on Labor and Public Welfare, Legislative History of the Employee Retirement Income Security Act of 1974, Pub. L. No. 93406 (Comm. Print 1976), at 1774-75 (statement of Sen. Hartke) ("The language [of ERISA § 510] parallels section 8(a)(3) of the National Labor Relations Act .... "). The presence of an express regulation of hiring practices in the NLRA implies that the omission of such language from § 510 of ERISA was deliberate, and that rehiring was not meant to be prohibited under § 510.

have been deprived of *anticipated benefits* ....

29 U.S.C. § 1001(a) (emphasis added). The continued reference to anticipated and promised benefits implies that Congress was concerned not with mandating the creation of benefit plans themselves or of new obligations for employers who choose to provide such plans, but rather intended to focus on requiring employers to make good on their guarantees to provide benefits once such promise was made. The Supreme Court recognized this when it defined the "prototypical" violation of § 510 as a termination to prevent a pension from vesting, *see Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 143 (1990), and described the ultimate purpose of the statute as "'ensuring that employers do not circumvent the provision of *promised benefits'* [in order to] 'make promises credible.'" *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Railway Co.*, 520 U.S. 510, 514 (1997) (quoting *Ingersoll-Rand*, 498 U.S. at 143 (1990), and *Heath v. Varity Corp.*, 71 F.3d 256, 258 (7th Cir. 1995)) (emphasis added). This interpretation was echoed in lower court analyses of § 510's purpose:

> [ERISA Sections] 502 and 510 together protect the panoply of rights at risk in the pension context: rights about to be earned but frustrated due to unlawful employer action, benefits earned but not paid, other rights due a participant but not fulfilled, and future benefits earned but not yet due.

Conkwright, 933 F.2d at 237, *cited in* (Mot. Pls. Summ. J. at 20); *see also Shahid v. Ford Motor Co.*, 76 F.3d 1404, 1412 (6th Cir. 1996) ("ERISA was designed to protect employees'

expectations in benefit plans.") *In re Unisys Retiree Med. Benefit "ERISA" Litig.*, 58 F.3d 896 (3d Cir. 1995 (focusing on whether employer had promised benefits to retirees). None of the rights listed are available to an applicant for employment. Plaintiffs in this case, despite their status as former Mack Truck employees, have not been victims of unlawful employer action, nor have they been denied benefits that they rightfully earned, They are seeking rehire. Until they are granted employment status, they have absolutely no new rights under the Plan, and therefore cannot claim to be denied any such rights.[15] Moreover, as explained above, refusing to rehire them is not unlawful employer conduct. In short, the statute's overall purpose to protect employees'

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[15] It is for this reason that we reject plaintiffs' reference to *Pickering v. USX Corporation*, 809 F. Supp. 1501 (Mot. Pls. Summ. J. at 14.) Plaintiffs fail to recognize that the employees in Pickering enjoyed a contractual recall right not possessed by Mack Truck employees. *See Pickering*, 809 F. Supp. At 1534 (noting that "employees also retain recall rights"); (Stip. at ¶25 ("None of the plaintiffs in this action were entitled to recall to mack workforce under the terms of the Mack-UAW Master Agreement or any local agreement.")). Interpreting § 510 to prohibit an employer's denial of contractual recall rights is consistent with the legislative history of the statute, namely that § 510 was drafted to protect employee's established rights under their individual benefit plans. The employees' claim in *Pickering* that their employer's scheme violated their *contractual right* to be recalled is therefore precisely the sort of claim meant to be actionable under § 5!0, Plaintiffs, however, have no such recall right and therefore are not similarly covered by § 510's protection of employees who "exercis[e] any right to which [they are] *entitled* under the provisions of an employee benefit plan" 29 U.S.C. § 1140 (emphasis added). As a result, we find that *Pickering* is inapplicable to plaintiffs' claim.

reliance on their employers' promise of benefits is not threatened by Mack Truck's refusal to rehire plaintiffs. The weight of controlling authority, in conjunction with the statute's legislative history, support our conclusion that § 510 of ERISA does not prohibit Mack Truck form refusing to rehire former employees in an attempt to avoid further pension liability. As there is no genuine issue of material fact to consider, we find that Mack Truck is entitled to summary judgment against plaintiffs.

IV. CONCLUSION

We find that plaintiffs whose benefits were not vested at the time of their termination from defendant Mack Truck are not participants in Mack Truck's benefit plan under ERISA §§ 3(7) & 502(a)(1)(B) (29 U.S.C. §§ 1002(7) & 1132(a)(1)(B)), and are therefore without standing to bring action against Mack Truck under § 510 of ERISA (29 U.S.C. § 1140). We also conclude that even those plaintiffs whose benefits were vested at termination and who therefore have standing to bring such an action, due to the weight of controlling case law and the legislative history of § 510, are not entitled to judgment as a matter of law against Mack Truck. Mack Truck's refusal to rehire plaintiffs in order to avoid incurring increased pension liabilities was a valid and lawful act under § 510. As such, defendant is entitled to judgment as a matter of law and, in turn, summary judgment against plaintiffs in their statutory claims for injunctive and monetary relief.

An appropriate order follows.

ORDER

And now, this 30th day of November, 2000, it is hereby ORDERED that defendant's Motion of Defendant Mack Trucks, Inc. for Summary Judgment, filed on October 6, 2000, is GRANTED. It is also hereby ORDERED that plaintiffs' Motion of Plaintiffs Claire Williams Et Al. for Summary Judgment of October 30, 2000 is DENIED. We adopt the foregoing memorandum as an explanation of our findings and conclusions. As a result of these conclusions, we find and determine that those plaintiffs whose benefits had not vested upon the termination of their employment with Mack Trucks, Inc. are without standing to bring suit under ERISA §§ 3(7) & 502(a)(1)(B) (29 U.S.C. §§ 1002(7) & 1132(a)(1)(B)). Mack Truck is also excluded from liability under § 510 of ERISA (29 U.S.C. § 1140) for refusing to rehire any of the 78 plaintiffs listed in the Amended Complaint in order to limit Mack Truck's potential liability under the Mack-UAW Pension Plan.

BY THE COURT

/s/ _____
Franklin S. Van Antwerpen
United States District Judge

Supreme Court, U.S.
FILED
JUN 27 2002
CLERK

No. 01-1723

In The
Supreme Court of the United States

LARRY BECKER, et al.,

Petitioners,

v.

MACK TRUCKS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. Whether an employer violates section 510 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1140, by refusing to hire former employees because their employment would have an adverse effect on the employer's pension funding liability?

II. Whether this Court's decision in *Inter-Modal Rail Employees Ass'n v. Atchinson, Topeka and Santa Fe Railroad*, 520 U.S. 510 (1997), alters the ERISA standing requirement set forth in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), that a former employee must have a colorable claim to vested benefits in order to have standing to bring an ERISA action?

LIST OF PARTIES TO THE PROCEEDING IN THE COURT BELOW

The named petitioners are identified in the petition for writ of certiorari.

Mack Trucks, Inc. is a wholly owned subsidiary of AB Volvo, a Swedish corporation publicly traded in the United States.

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II. THE DECISION OF THE COURT OF APPEALS THAT THE NON-VESTED PLAINTIFFS DO NOT HAVE STANDING TO ASSERT A CLAIM UNDER ERISA SECTION 510 IS CONSISTENT WITH THIS COURT'S DECISION IN *FIRESTONE TIRE & RUBBER CO. V. BRUCH* AND IS NOT CONTRARY TO THIS COURT'S DECISION IN *INTER-MODAL* 13

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STATUTORY PROVISIONS INVOLVED

Section 510 of the Employee Retirement Income Security Act provides, in relevant part:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act.

29 U.S.C. § 1140.

SUMMARY OF THE ARGUMENT

This Honorable Court should deny the petition for a writ of certiorari because the decision of the United States Court of Appeals for the Third Circuit does not meet any of the criteria for the granting of a petition set forth in the Rules of the Supreme Court of the United States.

This action arises under section 510 of ERISA, 29 U.S.C. § 1140 ("ERISA § 510"). The issue central to the case, whether an employer may refuse to hire former employees because of the adverse effect such employment would have on the employer's pension funding liability, is a narrow one, having arisen only twice in the history of the statute. As both occasions arose in Pennsylvania, there is no conflict among the courts of appeals on the point. The petitioners' assertion that the decision of the Third Circuit

here conflicts with *Heimann v. Nat'l Elevator Indus. Pension Fund*, 187 F.3d 493 (5th Cir. 1999), and *Mattei v. Mattei*, 126 F.3d 794 (6th Cir. 1997), on the question of whether a detriment to an employment relationship is necessary to a violation of ERISA § 510 is incorrect. In *Heimann* and *Mattei*, the courts applied ERISA § 510 to protect rights of the plaintiffs that had arisen out of pre-existing employment relationships. *Heimann*, 187 F.3d at 504; *Mattei*, 126 F.3d at 799. The Third Circuit here declined to apply ERISA § 510 in favor of plaintiffs whose benefits earned during a pre-existing employment relationship were not threatened, but who sought to create a new employment relationship and earn new benefits. Accordingly, the Third Circuit correctly distinguished *Heimann* and *Mattei*. *Becker v. Mack Trucks, Inc.*, 281 F.3d 372, 383 n.10 (3d Cir. 2002).

As to whether non-vested former employees have standing to bring an action under ERISA § 510, the lower court relied upon this Court's clear guidance in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), to hold that the non-vested former employees do not have standing. *Inter-Modal Rail Employees Ass'n v. Atchinson, Topeka and Santa Fe R.R.*, 520 U.S. 510 (1997), addresses only whether ERISA § 510 applies to welfare benefit plans and does not undercut the holding in *Firestone* or its applicability in this case.

REASONS FOR DENYING THE WRIT

I. THE HOLDING OF THE THIRD CIRCUIT COURT OF APPEALS THAT AN EMPLOYER MAY LAWFULLY REFUSE TO HIRE FORMER EMPLOYEES BECAUSE OF THE ADVERSE EFFECT OF THEIR EMPLOYMENT ON THE EMPLOYER'S PENSION FUNDING LIABILITY DOES NOT CREATE A CONFLICT AMONG THE CIRCUITS OR OTHERWISE RAISE A SIGNIFICANT ENFORCEMENT ISSUE UNDER ERISA.

This case presents a single narrow legal question: whether ERISA § 510 requires that an employer who is seeking to hire entry-level employees ignore the adverse financial effect of hiring job applicants who had previously worked for the employer and thus had prior credited service under the employer's pension plan.

This question has arisen only twice in the reported case law: in the present case, and in *Shawley v. Bethlehem Steel Corp.*, 784 F. Supp. 1200 (W.D. Pa. 1992), *aff'd on other grounds*, 989 F.2d 652 (3d Cir. 1993). The Third Circuit's decision here is consistent with the district court's decision in *Shawley*. No other court of appeals has addressed this discrete issue. For this Court to take up a question that has arisen only twice – both times in the same state – since passage of the statute in 1974, seems an injudicious use of the Court's limited resources.

The petitioners strain to articulate a conflict between the circuits, a traditional basis on which this Court grants writs, *see, e.g.*, S. Ct. R. 10. To do so, petitioners claim that one narrow aspect of the Third Circuit's opinion, which was not the primary basis for the court's decision, conflicts

with ERISA decisions from the Fifth and Sixth Circuits that are widely divergent on their facts. Petitioners argue that the Third, Seventh, and Tenth Circuits have held that the phrase "discriminate against" in ERISA § 510 presupposes an employment relationship, whereas the Fifth and Sixth Circuits construe ERISA § 510 without regard to the existence of an employment relationship. *Becker v. Mack Trucks, Inc.*, 281 F.3d 372; *Heimann v. Nat'l Elevator*, 187 F.3d at 507; *Mattei v. Mattei*, 126 F.3d at 804; *Lindenmann v. Mobil Oil Corp.*, 141 F.3d 290, 295 (7th Cir. 1998); *Anderson v. Chrysler Corp.*, 99 F.3d 846, 856 (7th Cir. 1996); *Teumer v. General Motors Corp.*, 34 F.3d 542, 544 (7th Cir. 1994); *Deeming v. American Standard, Inc.*, 905 F.2d 1124, 1127 (7th Cir. 1990); *Woolsey v. Marion Labs., Inc.*, 934 F.2d 1452, 1461 (10th Cir. 1991).

The primary bases for the Third Circuit's decision below were ERISA's explicit statutory language and ERISA's remedial objective. Whether detrimental effect upon the employment relationship is a necessary prerequisite to an ERISA § 510 claim is not central to the decision. Moreover, while the Third, Fifth, and Sixth Circuits may have employed divergent reasoning in support of their construction of ERISA § 510, all three courts recognized and gave meaning to ERISA's overriding remedial objective and ERISA § 510's special role in ERISA's remedial scheme; *that is*, Congress's intention to secure participants' and beneficiaries' settled expectations of receiving promised benefits through funding, fiduciary, disclosure and other requirements, and by prohibiting discriminatory interference with ERISA's "protected rights." *Becker*, 281 F.3d 372; *Heimann*, 187 F.3d 493; *Mattei*, 126 F.3d 794. Because there is no conflict among the circuits on this point and because the case does not otherwise present a

significant ERISA enforcement issue, granting the petition for a writ of certiorari is not appropriate.

A. No Conflict Exists Because The Primary Bases For The Third Circuit's Decision Are The Statutory Language And The Statutory Enforcement Scheme, And Not The Lack Of A Detriment To An Employment Relationship.

The Third Circuit's decision that an employer may refuse to hire job applicants who are former employees focused on "the explicit statutory language and the structure and purpose of the statute." App. 13a (quoting *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138 (1990)). First, the court correctly noted that "[t]he plain language of § 510 omits a refusal to 'rehire,' 'hire,' or to take any action related to hiring from its enumeration of prohibited acts." *Id.* at 14a. The court observed that, in numerous statutes enacted over many years, Congressional drafters who sought to protect employees from discriminatory hiring practices did so explicitly. *Id.* at 15a-16a. The court accordingly concluded that the omission in ERISA § 510 of such protection must have been intentional. *Id.* at 16a. The Third Circuit rejected the petitioners' invitation to construe the term "discriminate" in ERISA § 510 expansively because of this intentional omission of the phrase "refusal to hire." *Id.* at 14a. This holding does not conflict with any decision of any court at any level.

The Third Circuit found further support for its holding in ERISA's statutory purpose and overall regulatory scheme, noting that the purpose of the statute is "to protect benefits promised to an employee arising from a pre-existing employment relationship." *Id.* at 16a-17a.

The role of ERISA § 510 within the overall regulatory scheme is to make the promises of employee welfare and pension benefits credible by preventing employers from discharging or harassing their employees to prevent them from obtaining promised benefits. The Third Circuit cited this Court's decisions in *Ingersoll-Rand Co. v. McClendon*, 498 U.S. at 143 and *Inter-Modal Rail Employees Ass'n*, 520 at 515, as well as its own decision in *Gavalik v. Continental Can Co.*, 812 F.2d 834, 851 (3d Cir. 1987), and the decisions of the Seventh and Sixth Circuits, *Heath v. Varity Corp.*, 71 F.3d 256, 258 (7th Cir. 1995), and *West v. Butler*, 621 F.2d 240, 243 (6th Cir. 1980), in support of this well-established proposition. App. 17a-18a. Because a refusal to hire does not implicate benefits promised over the course of an employment relationship, it falls outside the statutory purpose as well as outside the language of ERISA § 510. The Third Circuit concluded:

> Unlike a discharge or other workplace harassment, a failure to hire does not amount to circumvention of promised benefits because job applicants who have yet to be hired have not been promised any benefits.

App. 19a. As noted above, this is not a proposition as to which the courts of appeals disagree.

When discussing ERISA's statutory purpose of protecting benefits promised over the course of an employment relationship, the Third Circuit observed that the broad array of safeguards put in place by Congress did not extend to job applicants because job applicants have not yet been promised any benefits. Thus, the Third Circuit looked to its prior decisions in *Haberern v. Kaupp Vascular Surgeons Ltd.*, 24 F.3d 1491, 1503 (3d Cir. 1994), and *Fischer v. Philadelphia Elec. Co.*, 96 F.3d 1533, 1543 (3d

Cir. 1996), and to the Seventh and Tenth Circuits' decisions in *Andersen v. Chrysler Corp.*, 99 F.3d 846, 856 (7th Cir. 1996), and *Woolsey v. Marion Labs., Inc.*, 934 F.2d 1452, 1461 (10th Cir. 1991), to support its conclusion that the term "discriminate" in ERISA § 510 "by no means suggests, however, that [Congress] intended to regulate action taken against a potential employee." App. 19a-20a.

Petitioners pounced upon the obvious fact that job applicants have no employment relationship to support their theory that the circuits are in conflict over the necessity of a disruption to the employment relationship for an ERISA § 510 claim. Contrary to the petitioners' claims, however, the Third Circuit's decision was driven by the undeniable reality that job applicants have no settled expectation of promised benefits – and therefore nothing for ERISA § 510 to protect – not by any requirement that the employer's conduct must be disruptive of an employment relationship. Accordingly, petitioners' request for a writ of certiorari is premised on a flawed interpretation of the Third Circuit's holding and should be denied.

B. No Conflict Exists Because The Third, Fifth And Sixth Circuit Decisions Are All Driven By ERISA's Fundamental Objective Of Securing Promised Benefits And Enforcing Protected Rights.

Heimann v. Nat'l Elevator Indus. Pension Fund, 187 F.3d 493 (5th Cir. 1999), *Mattei v. Mattei*, 126 F.3d 794 (6th Cir. 1997), and the Third Circuit's decision in this case are grounded on ERISA's fundamental statutory objective: the protection of participants' and beneficiaries' settled expectations of receiving promised benefits. In *Heimann* and *Mattei*, the plaintiffs had "protected rights"

arising out of pre-existing employment relationships that included participation in employer pension and welfare benefit plans. In the present case, the petitioners had no protected rights because they were mere "potential" employees who participated in nothing. App. 19a.

While a right to benefits arises only when an employer promises such benefits to an employee as part of the employment relationship, the right to receive those benefits may continue beyond the life of the employment relationship. Thus, as the Third Circuit recognized, job applicants must first have an employment relationship before a right to benefits is protected by ERISA, but as the Fifth and Sixth Circuits also recognized, after rights have arisen by virtue of an employment relationship, ERISA § 510 protects those rights even after the employment relationship ends. App. 20a; *Heimann v. Nat'l Elevator Indus. Pension Fund*, 187 F.3d 493, 507 (5th Cir. 1999); *Mattei v. Mattei*, 126 F.3d 794, 804 (6th Cir. 1997). It is not surprising, then, that the Fifth and Sixth Circuits applied ERISA § 510 to protect settled expectations that had arisen out of an employment relationship, whereas the Third Circuit refused to apply ERISA § 510 where no employment relationship yet existed.

Heimann involved a life-long union member who participated in multiemployer pension and health plans. *Heimann*, 187 F.3d at 498. When he retired, he and his wife began to receive pension benefits and retiree medical benefits. *Id.* Heimann later accepted a non-union management job. *Id.* A union official then informed the fund trustees that Heimann was working in "disqualifying employment" – though he was not – and demanded that the trustees suspend the Heimanns' benefits. *Id.* The trustees acquiesced. *Id.* at 498-99. The Heimanns filed

federal and state actions, claiming wrongful denial of pension and medical benefits and interference with Heimann's right under the plans to engage in non-disqualifying employment. *Id.* After the trial court dismissed all of the Heimanns' causes of action, the parties settled the Heimanns' claims for benefits under the plans. *Id.* The Fifth Circuit then considered whether the union official's intentional and malicious act of inducing the trustees to suspend the Heimanns' benefits was an ERISA § 510 violation. *Id.*

At the outset, the Fifth Circuit recognized that, as a "participant" and a "beneficiary," Mr. and Mrs. Heimann had "protected rights" to the pension and retiree medical benefits Mr. Heimann had earned through his employment. *Heimann*, 187 F.3d at 504. Unlike the petitioners here, who seek protection as job applicants who could earn additional benefits in prospective employment if hired, the plaintiffs in *Heimann* had a settled expectation of receiving benefits, having been promised those benefits during many years of employment. Unlike the Third Circuit, the Fifth Circuit did not decide whether the Heimanns had "protected rights" under ERISA in the absence of any employment relationship. Rather, the "protected rights" had arisen indisputably from his lifelong employment. *Heimann*, 187 F.3d at 507-09.

In deciding whether the conduct of the union official and the trustees was discriminatory interference with the Heimanns' ERISA "protected rights" in violation of ERISA § 510, the Fifth Circuit, like the Third Circuit, looked to the fundamental protections offered by ERISA and enforced in part through ERISA § 510. The Fifth Circuit stated:

> ERISA's basic purpose is 'to strengthen and improve the protections and interests of participants and beneficiaries of employee pension and welfare plans.' S. REP, No. 93-127. *See also,* H.R. REP, No. 95-533, stating that the 'primary purpose of the bill is the protection of individual pension rights[.].'

Heimann, 187 F.3d at 508. Having recognized ERISA's fundamental statutory objective, the court concluded that construing the term "discriminate" in ERISA § 510 as inclusive of the union official's conduct against the former employee and his beneficiary (even though the union official's conduct had no detriment on a current employment relationship) served that remedial objective of protecting settled expectations of receiving promised benefits. The court stated:

> ERISA's basic purposes, plain words and legislative history require a reading of section 510 and 502(a)(3) that provides all participants and beneficiaries, including former employees, former union members, and retirees with a remedy for economic retaliation because of participants' and beneficiaries' exercise of pension plan rights.

Id. at 508. Further,

> In the present case, it is not only more consistent with the broader context of ERISA and the primary purpose of ERISA § 510, but also explicitly required by the definitions of 'participant' and 'person' in [ERISA §3(7) and (9)], that we hold that former employee-participants are protected from economic retaliation by their former unions or employee organization and their former

> employers under § 510 for exercising their rights under the plans, ERISA and other laws.

Id. at 506.

The Fifth Circuit's decision in *Heimann* is consistent with the Third Circuit's observation that ERISA was intended to "safeguard employees' expectations with regard to promised benefits." App. 17a. As the Third Circuit pointed out, the Heimanns' "protected rights" arose out of a "pre-existing employment relationship." App. 20a. The Fifth Circuit simply applied ERISA § 510 to protect those rights. This result is not inconsistent with the Third Circuit's refusal to permit job applicants seeking additional "protected benefits" in prospective employment to invoke the protection of ERISA § 510.

Mattei was a dispute between the widow of a deceased participant and the executor of the participant's estate. *Mattei v. Mattei*, 126 F.3d 794, 796 (6th Cir. 1997). Prior to her marriage to the participant, the widow had executed an antenuptial agreement in which she released all claims to the participant's estate in exchange for a fixed weekly payment from the estate for the remainder of the widow's life. *Id.* Prior to his death, the participant was covered by a pension plan at his place of employment. *Id.* When the participant died, the plan administrator determined that the widow, as the participant's beneficiary, was entitled to the death benefit provided under the plan, notwithstanding the executor's claim to the contrary. *Id.* After the plan paid the widow a lump sum death benefit, the executor terminated the estate's weekly payments that were payable to the widow under the antenuptial agreement. *Id.* The widow sued the executor under ERISA § 510, claiming that the termination of her weekly payments retaliated

against her for asserting her claim to the death benefit to which she was entitled under the plan. *Id.* at 796-97.

Again, at the outset, the Sixth Circuit recognized that the widow, as the deceased participant's beneficiary, had a "protected right" under ERISA to receive the death benefit. *Mattei*, 126 F.3d at 796 n.2. Thus, unlike the petitioners here who seek protection as job applicants, but like the Heimanns who relied on promises of benefits made during Mr. Heimann's years of employment, the widow had a settled expectation of receiving the death benefit based on her husband's prior employment. Like the Fifth Circuit in *Heimann*, the Sixth Circuit did not address whether the widow had a "protected right" under ERISA in the absence of an employment relationship, because the decedent's prior employment relationship gave rise to the "protected right" at issue in the case.

Having recognized that the widow had a "protected right," the Sixth Circuit instead addressed several other questions, including whether, in the absence of a detriment to an employment relationship, the estate's termination of the widow's weekly payments under the antenuptial agreement was discriminatory interference with the widow's "protected rights" in violation of ERISA § 510. The Sixth Circuit, like the Third Circuit here and the Fifth Circuit in *Heimann*, looked to the fundamental protections offered by ERISA. The Sixth Circuit stated:

> The overarching goal of the statute was to protect rights conferred by an employee benefit plan .... [The committee report ... evinced Congress's desire for section 510 to protect pension rights and expectations from 'economic sanctions' – a broad description not limited to the sphere of employment ...

Mattei, 126 F.3d at 799. The Sixth Circuit then held that the estate's action was discriminatory interference with the widow's right to receive the death benefit.

The Sixth Circuit's decision in *Mattei* is not inconsistent with the Third Circuit's decision in this case. The *Mattei* widow had a settled expectation under the plan that she would receive a death benefit that had been promised her deceased husband during his employment. The estate's suspension of the antenuptial agreement payments interfered with the widow's settled expectation of receiving the death benefit earned by her deceased spouse during his prior employment. As the Third Circuit also pointed out in the present action, quite unlike the job applicants who sought protection of benefits that would arise in prospective employment, the widow's rights stemmed from a "pre-existing employment relationship." *Mattei*, 126 F.3d at 806.

II. THE DECISION OF THE COURT OF APPEALS THAT THE NON-VESTED PLAINTIFFS DO NOT HAVE STANDING TO ASSERT A CLAIM UNDER ERISA SECTION 510 IS CONSISTENT WITH THIS COURT'S DECISION IN *FIRESTONE TIRE & RUBBER CO. V. BRUCH* AND IS NOT CONTRARY TO THIS COURT'S DECISION IN *INTER-MODAL*.

The seventy-eight plaintiffs in this action fall into two categories: first, a group whose credited service had vested before they terminated employment; and second, a group whose credited service was not vested because they terminated employment before satisfying the plan's vesting requirement. Applying the standard established by this Court in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), the lower court correctly determined that the non-vested plaintiffs were not "participants" within the

meaning of ERISA § 3(7), 29 U.S.C. § 1002(7), and as a result, did not have standing to assert their ERISA § 510 claim. Under *Firestone,* a claimant is a "participant" if he has a colorable claim to vested benefits. *Id.* at 117. The lower court ruled that the non-vested plaintiffs' non-vested credited service (albeit nonforfeitable credited service) merely gave rise to a contingent claim for future benefits that did not meet *Firestone's* standard for "participant" status. *Id.* at 117-19.

Contrary to the petitioners' assertion, this Court's decision in *Inter-Modal Rail Employees Ass'n v. Atchinson, Topeka, and Santa Fe R.R.,* 520 U.S. 510 (1997), does not establish a new standard for determining "participant" status under ERISA § 3(7), and thus does not address the threshold question of standing to bring any type of ERISA claim, including an ERISA § 510 claim.[1] This Court's decision in *Inter-Modal* addressed the merits of the *Inter-Modal's* plaintiffs' ERISA § 510 claim, holding that ERISA § 510's protections extend to both pension plan benefits that vest and welfare plan benefits that ordinarily do not vest. *Inter-Modal* did not speak to the categories of claimants who may be "participants" under ERISA § 3(7) and

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[1] In fact, contrary to the petitioners' assertion, Pet. For Writ of Cert. at 15-16, neither the Ninth Circuit nor this Court addressed whether the *Inter-Modal* plaintiffs had standing as "participants" to assert an ERISA claim. Rather, since the *Inter-Modal* plaintiffs clearly had standing as "participants," both courts focused on whether the plaintiffs' claim of interference with ERISA protected rights was actionable under ERISA § 510. The Ninth Circuit held that the plaintiffs' claim of interference with welfare benefits was not actionable because those benefits were not vested, and this Court reversed, holding that rights to non-vested welfare benefits are protected by ERISA § 510.

thus have standing to bring an ERISA claim, including an ERISA § 510 claim.

Inter-Modal, thus, does not disturb this Court's decision in *Firestone.* In fact, *Inter-Modal* and *Firestone* are complimentary rulings that further the analysis of ERISA's remedial scheme. *Firestone* protects a broad range of ERISA claimants by conferring "participant" status on four categories of claimants: 1) any claimant who has a colorable claim that he will prevail in a suit for benefits; 2) any claimant who has a colorable claim that he will fulfill eligibility requirements in the future; 3) any claimant who has a reasonable expectation of returning to covered employment; and 4) any claimant who has a colorable claim to vested benefits. A claimant who can satisfy any one of *Firestone's* four tests, three of which do not specifically require vesting, will have standing to assert an ERISA § 510 claim.[3] *Id.*

The fourth category of *Firestone's* "participant" test (and the lower court's analysis of that category when it ruled that the non-vested plaintiffs do not have standing)

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[3] In fact, the Third Circuit found that the non-vested plaintiffs were not "participants" because they did not have a reasonable expectation of returning to covered employment and because they did not have a colorable claim to vested benefits. Had their collectively bargained recall rights not expired or been waived, the non-vested plaintiffs likely would have satisfied this prong of the *Firestone* standard and had standing to bring their ERISA § 510 claim. Similarly, the non-vested plaintiffs could not establish their inclusion in the first two *Firestone* categories since those categories apply only to current employees, not to former employees. However, had the non-vested plaintiffs been able to satisfy any of *Firestone's* other three tests, they could have asserted their ERISA § 510 claim regardless of vesting.

is not undercut by *Inter-Modal*. *Firestone*'s focus on a claimant's potential vested status is simply a method for defining the universe of potential ERISA claimants who "may become eligible" for a benefit within ERISA's definition of "participant." *Firestone*, 489 U.S. 101. The method by which a court identifies a claimant as a "participant" within the meaning of ERISA § 3(7) has no bearing on the substantive validity of the participant's ERISA claim, which the court addressed in *Inter-Modal*. *Firestone*, 489 U.S. 101; *Inter-Modal*, 520 U.S. 510. That the Third Circuit used the fourth category of the *Firestone* test to determine that the non-vested plaintiffs lack "participant" status is not inconsistent with *Inter-Modal* because standing is a threshold analysis entirely separate from the substantive analysis of the ERISA § 510 claim. *Id*. Thus, the lower court's reliance on the *Firestone* standing analysis claim does not conflict with this Court's decision in *Inter-Modal*.

III. CONCLUSION

For the foregoing reasons, Respondent Mack Trucks, Inc., respectfully requests that this Court deny the petition for a writ of certiorari.

Respectfully submitted,

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